

# REASONING RIGHTS

## COMPARATIVE JUDICIAL ENGAGEMENT



*Edited by* Liora Lazarus,  
Christopher McCrudden and Nigel Bowles

## REASONING RIGHTS

This book is about judicial reasoning in human rights cases. The aim is to explore the question: how is it that notionally universal norms are reasoned by courts in such significantly different ways? What is the shape of this reasoning; which techniques are common across the transnational jurisprudence of human rights; and which are characteristic of particular jurisdictions?

The book, comprising contributions by a team of world-leading human rights scholars, moves beyond simply addressing the institutional questions concerning courts and human rights, which often dominate discussions of this kind, seeking instead a deeper examination of the similarities and divergence of reasoning by different courts when addressing comparable human rights questions. These differences, while partly influenced by institutional factors, cannot be attributed to them alone. Through a set of case studies across selected jurisdictions, this book explores the diverse and rich underlying spectrum of human rights reasoning, as a distinctive and particular form of legal reasoning.



# Reasoning Rights

## Comparative Judicial Engagement

General Editors

Liora Lazarus

Christopher McCrudden FBA

Nigel Bowles

Co-ordinating Editor

Laura Hilly

Sub Editors

Ryan Goss

Kai Möller

Brett Scharffs

Murray Wesson



• H A R T •  
PUBLISHING

OXFORD AND PORTLAND, OREGON

2014

Published in the United Kingdom by Hart Publishing Ltd  
16C Worcester Place, Oxford, OX1 2JW  
Telephone: +44 (0)1865 517530  
Fax: +44 (0)1865 510710  
E-mail: [mail@hartpub.co.uk](mailto:mail@hartpub.co.uk)  
Website: <http://www.hartpub.co.uk>

Published in North America (US and Canada) by  
Hart Publishing  
c/o International Specialized Book Services  
920 NE 58th Avenue, Suite 300  
Portland, OR 97213-3786  
USA  
Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190  
Fax: +1 503 280 8832  
E-mail: [orders@isbs.com](mailto:orders@isbs.com)  
Website: <http://www.isbs.com>

© The editors and contributors severally 2014

The editors and contributors have asserted their right under the Copyright, Designs and Patents Act 1988,  
to be identified as the authors of this work.

Hart Publishing is an imprint of Bloomsbury Publishing plc.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system,  
or transmitted, in any form or by any means, without the prior permission of Hart Publishing,  
or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights  
organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed  
to Hart Publishing Ltd at the address above.

British Library Cataloguing in Publication Data  
Data Available

ISBN: 978-1-84946-252-5  
ISBN (ePDF): 978-1-84946-814-5

## Preface

This book adopts an explicitly *comparative* method to the analysis of human rights adjudication. Each contributor to the book was asked to reflect on his or her own jurisdiction, by looking at it through the lenses of other jurisdictions. The aim of the book is, however, to examine judicial reasoning in human rights cases not only by way of a comparative approach but also through the use of what might be called a *problem-centred* comparative approach, through the selection of practical human rights problems and how they are addressed in the jurisprudence of these different jurisdictions, problems that we considered were likely to illustrate the fault lines of differing judicial approaches to human rights.

To achieve these aims, the book draws together human rights and constitutional law theorists and practitioners, selected from a number of jurisdictions, to examine competing judicial approaches regarding four broad themes: the approach to the balancing of rights and public goals (eg through doctrines of proportionality); the relationship between rights and national security; the jurisprudence around religious freedom; and the development of socio-economic rights. We are grateful to all the contributors for throwing themselves into the project with enthusiasm, and for the tolerance they showed at our incessant requests for revisions.

The immediate idea for the book arose from a colloquium on *US Constitutionalism in Decline?: An International Perspective* held at the Rothermere American Institute of Oxford University, in April 2010. The point of the conference was chiefly to draw American constitutional theorists and practitioners into a broader comparative debate with equivalent theorists and practitioners in the United Kingdom, Germany, South Africa, Canada and India. We believed such an engagement was most fruitfully conducted outside of the United States, and that the Rothermere American Institute was a suitable forum in which to hold such an engagement. While the colloquium focused on the question of American ‘exceptionalism’, it quickly became clear that the book should explore more broadly the diverse approaches to rights interpretation that arose in the discussions. Inclusion of US constitutional approaches remains a connecting thread within and between each of the sections, but the book does not limit itself to the question of American judicial approaches to rights interpretation.

The book was also significantly influenced in its conception and in the methods adopted by the seminar on *Comparative Human Rights Law* which has long been a mainstay of, and one of the most popular subjects in, the taught graduate law (BCL) programme of the Oxford University Law Faculty. Originally conceived by Polyvios Polyviou and Eric Barendt in the late 1970s, it was convened or co-convened by Christopher McCruden, the Professor of Human Rights at Oxford, from 1980 until 2011 when he took up a professorship at Queen’s University Belfast. Since that time, Liora Lazarus has worked alongside Sandra Fredman and other law faculty colleagues in the delivery of the course. Several of the contributors to the book either took part in the seminars as students (Ryan Goss, Murray Wesson, Edwin Cameron), or were involved in teaching on the course as teaching assistants or co-conveners (Jeff King) or, in the case of Kai Möller, all three.

Students and co-convenors who took part in that course will see many of their ideas reflected in these pages. We are grateful to them for their unknowing contribution to this book.

The three substantive topics (religion, security, socio-economic) were chosen for three main reasons. The first was topicality: all three topics are the subject of current judicial consideration and illustrate current judicial approaches to rights interpretation. A second reason was the extent to which these topics have occasioned judicial decisions across a wide range of different jurisdictions, thus enabling a comparative approach to be adopted. A third reason was that, since each has already been the subject of extensive comparative scholarship, contributors were able to build their examination on solid foundations. We also devote significant attention to a more ‘procedural’ topic, the use of proportionality analysis by courts, that cuts across these specific substantive areas, and is central to current comparative discussions of rights adjudication.

After an Introduction by Christopher McCrudden that draws out common themes, and sets out the conceptual, institutional and normative issues that arise from the comparative study of human rights adjudication, the book is divided into four Parts, to reflect these four topics. Each Part was managed by one or more sub-editors who are specialists in the given field. They are: Ryan Goss and Liora Lazarus (Rights and National Security); Murray Wesson (Socio-Economic Rights); Brett Scharffs and Christopher McCrudden (Rights and Religion), and Kai Möller (Proportionality). Part of the plan for this book was to invite a number of scholars from various countries and legal backgrounds, to reflect upon a common set of cases, which should magnify the usefulness of the comparative perspectives that each will bring to the topic. Thus, it was important that the set of cases that we use as our common canon should have been chosen with care. The sub-editors of each Part liaised with the contributors to the section to finalise a list of leading cases for consideration in each section. Whilst we remain committed to the utility of this method, we are not blind to the problem of case-selection in doing comparative human rights analysis: concentrating on just one set of cases may give a highly skewed impression of the way in which a jurisdiction behaves generally. The result is a series of studies in different areas that are illustrative of similarities and differences rather than being comprehensive.

Each sub-editor was then responsible for overseeing the management and production of the comparative contributions on the theme within each Part. It was the responsibility of the sub-editor to stimulate contributors to engage with each other to ensure that a reflexive and comparative process was conducted. Contributors were encouraged to engage not only with the leading cases identified but also with the chapters of other contributors in their Part. Draft chapters were circulated around the group prior to final completion. Finally, the sub-editor was responsible for producing a subject introduction for their Part, providing an overview of the leading cases in issue and situating them in the deeper themes of the book, considering how the chapters fit into the current scholarship on comparative human rights, and what they add to that scholarship. We are deeply grateful to them for the efforts and skills they brought to bear to ensure that these objectives were met.

As General Editors, we must record our deepest gratitude to Laura Hilly, who acted as Co-ordinating Editor throughout. That title does not capture fully or adequately Laura’s involvement at almost every stage of the process, nor the extent to which the fact that you, the reader, is holding the book in your hands now is due to her determination, good

humour and dedication. We are also most grateful to Hart Publishing, in particular Tom Adams and Mel Hamill, who guided the book through its production stages with tolerance and expertise. Thank you.

Liora Lazarus worked on this book alongside her primary research during her year as a British Academy Mid-Career Fellow. She is deeply grateful to the Academy for the support for her academic work in general. She would like to thank Miles Jackson for his early work on the Rothermere Conference, Natasha Simonsen for teaching assistance alongside this project, and Christopher Boule for his supportive friendship. Finally, she would like to thank her fiancé, Kim Stern, for her love and creative support of all her work.

Christopher McCrudden was awarded a Major Research Fellowship by the Leverhulme Trust, to work on comparative human rights between 2011 and 2014, when the book was largely conceived and executed. It is difficult to overestimate the extent to which such awards contribute to scholarly activity in the United Kingdom, and he is deeply grateful to the Trust for their generosity and cooperation throughout the Fellowship. He also wishes to thank Queen's University, Belfast and the University of Michigan Law School for granting him a leave of absence to take up the Fellowship. Much of his Introduction was written during a most enjoyable period at New York University Law School during 2013–14, when he was a Joint Straus/Emile Noël Fellow, and a Visiting Fellow at the Center for Constitutional Transitions. He is grateful to Joseph Weiler, Gráinne de Búrca and Sujit Choudhry for their hospitality and collegiality during his stay in New York. As always, he is particularly grateful to Caroline, Joseph and Kathleen for their love and support.

Nigel Bowles wishes to thank Liora Lazarus and Christopher McCrudden for their intellectual fellowship and leadership – both in the stimulating conference that gave form to the idea for the book and in the book's development, writing and editing that has followed. He wishes also to thank his colleagues at the Rothermere American Institute not just for making the Institute the seat of Oxford's conversation with America, but for making it the best place beyond America's shores in which to teach, think, research, and reflect upon how and why the United States has come to be the polity and society that it is. The RAI's perspectives are external, scholarly, and comparative – as this book itself suggests.

Liora Lazarus  
Christopher McCrudden  
Nigel Bowles  
Easter 2014





# Contents

<i>Preface</i>	v
<i>Author Biographies</i>	xiii
Part 1: INTRODUCTION	
1. The Pluralism of Human Rights Adjudication	3
<i>Christopher McCrudden</i>	
I. Method and Scope	3
II. The Adjudicatory Pluralism of Human Rights	11
III. Conclusion	26
Part 2: PROPORTIONALITY	
2. Constructing the Proportionality Test: An Emerging Global Conversation	31
<i>Kai Möller</i>	
3. Necessity and Proportionality: Towards a Balanced Approach	41
<i>David Bilchitz</i>	
I. Introduction	41
II. Two Problems with Strict Necessity	43
III. Toward a Moderate Interpretation of Necessity	51
IV. Conclusion	61
4. Proportionality Without Balancing: Why Judicial Ad hoc Balancing is Unnecessary and Potentially Detrimental to the Realisation of Individual and Collective Self-determination	63
<i>Jochen von Bernstorff</i>	
I. Introduction	63
II. Why Ad hoc Balancing is Potentially Detrimental to the Realisation of Collective and Individual Self-determination	68
III. Why Ad hoc Balancing is Unnecessary: A Comparative Perspective	71
IV. Coming Clean: Proportionality Without Ad hoc Balancing	83
5. Proportionality in United States Constitutional Law	87
<i>Paul Yowell</i>	
I. Introduction	87
II. The European Proportionality Inquiry	87
III. Necessity and Balancing	90
IV. Tiered Scrutiny and Variable Intensity of Review	94
V. The Historical Origins of Proportionality and Balancing in the US and Germany	101
VI. Conclusion	113

Part 3: NATIONAL SECURITY AND HUMAN RIGHTS

6. 'To the Serious Detriment of the Public': Secret Evidence and Closed Material Procedures	117
<i>Ryan Goss</i>	
I. Introduction	117
II. The Importance of Open Justice	119
III. Balancing Open Justice with Other Public Interests	122
IV. Exploring Ways to Balance Open Justice and Broader Public Interests	124
V. Conclusion	133
7. National Security Law and the Creep of Secrecy: A Transatlantic Tale	135
<i>Tom Hickman and Adam Tomkins</i>	
I. Introduction	135
II. The <i>Norwich Pharmacal</i> Jurisdiction in English Law	136
III. The <i>Binyam Mohamed</i> Case	137
IV. Reactions to <i>Binyam Mohamed</i>	143
V. National Security Litigation in the US: The Breadth of Secrecy	146
VI. A Clash of Legal Cultures	152
VII. The Wider Impact of the <i>Norwich Pharmacal</i> Issue	155
VIII. Conclusion	159
8. Navigating the Shoals of Secrecy: A Comparative Analysis of the Use of Secret Evidence and 'Cleared Counsel' in the United States, the United Kingdom, and Canada	161
<i>David Cole and Stephen I Vladeck</i>	
I. Introduction	161
II. The Processes Explained	164
III. Applicable Principles	170
IV. Identifying 'Best Practices'	171
V. Common Problems	174
VI. Conclusion	176
9. The Secret Keepers: Judges, Security Detentions, and Secret Evidence	179
<i>Shiri Krebs</i>	
I. Introduction	179
II. Security Detentions, Secrecy and Judicial Review	181
III. Security Detentions in Israel	183
IV. Reasoning Rights: Balancing Security and Liberty in the Shadows of Secrecy	188
V. Realising Rights: The Outcomes of Judicial Review Relating to the Named Individuals	191
VI. Between Reasoning Rights and Realising Rights: <i>Jaber Mamduch Aberah v IDF Commander in the West Bank</i>	195
VII. The Secret Keepers: Behind the Closed Doors of the Judicial Management Model	198
VIII. Judicial Management vs Special Advocates	204
IX. Conclusion	206

## Part 4: RELIGION AND HUMAN RIGHTS

10. The Intersection of Religious Autonomy and Religious Symbols: Setting the Stage	209
<i>Christopher McCrudden and Brett G Scharffs</i>	
I. Introduction	209
II. Introducing the Cases	209
III. Framing the Issues	213
IV. The Models Applied and Tested	218
V. The Contributions	219
VI. Conclusion	221
11. Principles and Compromises: Religious Freedom in a Time of Transition	223
<i>Carolyn Evans</i>	
I. Introduction	223
II. Four Approaches to Religious Autonomy at Work Cases	225
III. Conclusion	236
12. State Interference in the Internal Affairs of Religious Institutions	241
<i>Johan D Van der Vyver</i>	
I. Introduction: The Focus of Sphere Sovereignty Defined	241
II. Internal Powers of Religious Institutions	243
III. Concluding Observations	257
13. The Protection of Religious Freedom in Australia: A Comparative Assessment of Autonomy and Symbols	259
<i>Paul Babie and James Krumrey-Quinn</i>	
I. Introduction	259
II. The Protection of Religious Freedom in Australia	260
III. Comparative Assessment	266
IV. Conclusion	277

## Part 5: SOCIO-ECONOMIC RIGHTS

14. The Emergence and Enforcement of Socio-Economic Rights	281
<i>Murray Wesson</i>	
I. Introduction	281
II. The Emergence of Socio-Economic Rights	283
III. South Africa and the Culture of Justification	286
IV. India, the United States, and the Promise of Judicial Activism	290
V. The Future of Socio-Economic Rights Jurisprudence	295
VI. Conclusion	297
15. The Problematic of Social Rights – Uniformity and Diversity in the Development of Social Rights Review	299
<i>Colm O’Cinneide</i>	
I. Introduction	299
II. The Orthodox Distinction between ‘Permissible’ Civil and Political Rights Review and ‘Impermissible’ Social Rights Review	300

III. The Unstable Distinction between Civil/Political and Social Rights Review	302
IV. The Questionable Legitimacy of the Orthodox Position	305
V. The 'Social Rights Problematic'	307
VI. The Diverse Forms of Social Rights Review	311
VII. Questioning Uniformity: The Case for Diversity in Social Rights Review	315
VIII. Conclusion	317
16. A South African Perspective on the Judicial Development of Socio-Economic Rights <i>Edwin Cameron</i>	319
I. Introduction	319
II. Objections to Socio-Economic Rights	320
III. Setting the Standard for Judicial Review	323
IV. Critical Analysis of the Constitutional Court's Approach to Socio-Economic Rights	325
V. Crafting Appropriate Remedies in Socio-Economic Rights Cases	330
VI. The South African Approach in Comparative Perspective	332
VII. Lessons for Other Jurisdictions	334
17. Judicial Activism and the Indian Supreme Court: Lessons for Economic and Social Rights Adjudication <i>Anashri Pillay</i>	339
I. Introduction	339
II. Directive Principles of State Policy, Land Reform and the Judiciary	340
III. Public Interest Litigation: Making Directive Principles of State Policy Justiciable	343
IV. Later Cases: Judicial Activism Curtailed?	347
V. Lessons from the Indian Experience of Economic and Social Rights Adjudication	351
VI. Conclusion	355
18. American Exceptionalism over Social Rights <i>Jeff King</i>	357
I. Introduction	357
II. The First Irony: Exceptional Judicial Enforcement of Certain Social Welfare Rights	358
III. The Second Irony: Mixed Results	368
IV. Potential Causes	374
V. Conclusion and Lessons for Other Countries	376
<i>Index</i>	379

# Author Biographies

## General Academic Editors

### Nigel Bowles

Nigel Bowles is the Director of the Rothermere American Institute, and a Fellow of Corpus Christi College Oxford. Prior to taking up this post in September 2011, he was for more than 20 years Tutorial Fellow in Politics at St Anne's College, Oxford. He was previously a staff member in the House of Commons before being appointed a Lecturer in Politics at the University of Edinburgh. His intellectual interests lie in American political history and, in particular, in the history of the US Presidency. Among his publications are *The White House and Capitol Hill*, an exploration of the politics of presidential lobbying; and *Nixon's Business: Authority and Power in Presidential Politics* in which he examines the relationship between authority and power in five cases of President Nixon's leadership of economic policy.

His outside interests include music (especially solo piano, and eighteenth and nineteenth-century chamber music), cricket, food, and charities working in the environmental, educational, and heritage sectors.

### Liora Lazarus

Liora Lazarus is an Associate Professor in Law, Associate Director of the Oxford Human Rights Hub, and Fellow of St Anne's College. Her primary research interests are in comparative human rights, security and human rights, comparative theory and comparative criminal justice. She has published a monograph, *Contrasting Prisoners' Rights* (OUP, 2004) and a number of shorter pieces in criminal justice, security and human rights. She co-edited *Security and Human Rights* (Hart, 2007) with Ben Goold and has since completed a number of public reports on various aspects of human rights for the UK Ministry of Justice, The UK Stern Review into the treatment of Rape Complaints, and the European Union Parliament. Liora has just come to the end of a British Academy Mid-Career Fellowship. This has enabled her to undertake research towards the completion of two monographs entitled *Securing Legality* and *Juridifying Security*, which are due to be published by Hart Publishing in 2015 and 2016 respectively. The continuing work on these books is supported by the Oxford Martin Programme on Human Rights for Future Generations.

### Christopher McCrudden

Christopher McCrudden is Professor of Human Rights and Equality Law, Queen's University Belfast, and William W Cook Global Law Professor at the University of Michigan Law School. He is a graduate of Queen's University Belfast (1970–74). He was awarded a Harkness Fellowship in 1974 and spent two years at Yale Law School (1974–76), and then at Oxford University as a doctoral student, first at Nuffield College (1976–

77), and then at Balliol College as a Junior Research Fellow (1977–80). He was elected as Fellow and Tutor in Law at Lincoln College, and CUF Lecturer in the Oxford Law Faculty in 1980, and Professor of Human Rights Law in 1998. He is a barrister at the English Bar (Gray's Inn) and has been called to the Northern Ireland Bar; he is a Non-Resident Tenant at Blackstone Chambers. He is the author of *Buying Social Justice* (Oxford University Press, 2007), for which he was awarded a Certificate of Merit by the American Society of International Law in 2008, and (with Brendan O'Leary) *Courts and Consociations: Human Rights versus Power Sharing* (Oxford University Press, 2013). He has also edited *Understanding Human Dignity* (Oxford University Press, 2013). He serves on the editorial boards of several journals, including the *Oxford Journal of Legal Studies*, the *International Journal of Discrimination and the Law*, and the *Journal of International Economic Law*, and is co-editor of the *Law in Context* series. He serves on the European Commission's Expert Network on the Application of the Gender Equality Directives. In 2006, Queen's University, Belfast, awarded him an honorary LL.D. He was elected a Fellow of the British Academy in 2008, and in 2011 he was awarded a three-year Leverhulme Major Research Fellowship. In 2013–14 he was a Straus Fellow at New York University Law School, and in 2014–15 he will be a fellow at the *Wissenschaftskolleg* in Berlin.

### *Co-ordinating Editor*

#### **Laura Hilly**

Laura Hilly is currently undertaking a DPhil in Law at the University of Oxford. Her research project is supervised by Professor Nicola Lacey and Professor Sandra Fredman. It considers the contribution that gender diversity brings to appellate courts in common law jurisdictions. She completed her BA/LLB at the Australian National University, and then worked at the Federal Court of Australia as an Associate to the Honourable Chief Justice Black AC; and as a litigation solicitor at Blake Dawson. With the support of a Rhodes Scholarship she came to Oxford in 2009, completing the BCL in 2010, and her MPhil dissertation entitled *A Woman's Contribution: Gender Diversity and the Judicial Process* in 2011. Her DPhil research is supported by a Clarendon Scholarship. She is the former Chair of Oxford Pro Bono Publico and a current Managing Editor of the Oxford Human Rights Hub Blog.

### *Sub Editors*

#### **Ryan Goss**

Ryan Goss is Lecturer in Law at the Australian National University, Canberra. Ryan's research focuses on public law and European human rights law, particularly fair trial rights; he teaches public law and human rights law. His book, *Criminal Fair Trial Rights: Article 6 of the European Convention on Human Rights*, will be published by Hart Publishing in 2014. A Rhodes Scholar from Queensland, and previously Junior Research Fellow in Law at Lincoln College, Oxford, Ryan has been at the ANU since mid-2013.

### Kai Möller

Kai Möller is Associate Professor of Law at the London School of Economics and Political Science. His previous positions include a Junior Research Fellowship and a Lectureship in Jurisprudence at Lincoln College, Oxford. He holds a PhD in law from Freiburg University and MJur, MPhil and DPhil degrees from Oxford. His research is mainly in the areas of constitutional theory and comparative constitutional and human rights law. His most recent book, *The Global Model of Constitutional Rights*, was published by Oxford University Press in 2012.

### Brett Scharffs

Brett Scharffs is Francis R Kirkham Professor of Law at Brigham Young University's J Reuben Clark Law School, Associate Dean for Research and Academic Affairs, and Associate Director of the International Center for Law and Religion Studies. His teaching and scholarly interests include constitutional and comparative law, law and religion, international business law, philosophy of law, and legal reasoning and rhetoric. His articles include 'The Role of Humility in Exercising Practical Wisdom' (*UC Davis Law Review*), 'Adjudication and the Problems of Incommensurability' (*William and Mary Law Review*), 'Law as Craft' (*Vanderbilt Law Review*), and 'The Character of Legal Reasoning' (*Washington and Lee Law Review*). His casebook, *Law and Religion: National, International and Comparative Perspectives* (co-authored with W Cole Durham, Jr), has been translated into Chinese, Vietnamese, and Turkish, and is scheduled for a second English edition in 2014. He is currently writing a book about legal reasoning and rhetoric. He has served as Chair of the Law and Religion Section of the Association of American Law Schools, and is currently Chair-elect of the Law and Interpretation Section of the AALS. He is on the editorial board of the *Oxford Journal of Law and Religion* and the Advisory Board of the Research Unit for the Study of Society, Law and Religion at the University of Adelaide.

### Murray Wesson

Murray Wesson's research is in the areas of constitutional and human rights law. He is currently working on a monograph entitled *The Limits of Constitutional Justice* that will be published by Hart Publishing in 2015, and has published a number of articles and chapters on human rights. He completed his LLB at the University of KwaZulu-Natal in Durban, South Africa. He then studied at the University of Oxford on the KwaZulu-Natal Rhodes Scholarship, where he completed a Bachelor of Civil Law, MPhil and DPhil degrees. He has taught at the Universities of KwaZulu-Natal, Oxford and Leeds, and been a visiting lecturer at the Central European University in Budapest and the Law Institute in Jersey. He is an Associate Professor at the Faculty of Law, University of Western Australia.

### Authors

#### Paul Babie

Paul Babie is Associate Professor and Reader in Law and Associate Dean of Law (Research), Adelaide Law School, Associate Dean (Research), Faculty of the Professions,



and Director, Research Unit for the Study of Society, Law and Religion (RUSSLR), at the University of Adelaide. Paul holds a BA in sociology and political science from the University of Calgary, a BThSt from Flinders University, a LLB from the University of Alberta, a LLM from the University of Melbourne, and a DPhil in law from the University of Oxford. Paul is a Barrister and Solicitor of the Court of Queen's Bench of Alberta, Canada, and an Associate Member of the Law Society of South Australia. Paul's primary research area is legal theory, especially the nature and concept of property and the relationship between law and religion. He has published widely in both areas. Paul teaches property law, property theory, and law and religion.

### **David Bilchitz**

David Bilchitz is a Professor at the University of Johannesburg and Director of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC). He has also recently become the Secretary General of the International Association of Constitutional Law (IACL) for the period from April 2013–June 2014. He publishes widely in the field of constitutional and fundamental rights law and has authored the monograph *Poverty and Fundamental Rights: the Justification and Enforcement of Socio-Economic Rights* (Oxford University Press, 2007). He has co-edited two books on constitutional law and business and human rights respectively, and published many book chapters and articles in journals. He has also been the guest editor of special editions for the *South African Journal on Human Rights* and *Southern African Public Law*. In 2013, David was asked to provide expert advice on the Tunisian Draft Constitution by the United Nations Development Programme and the organisation IDEA. His work is not confined to theoretical contributions but he also works actively towards social reform with his involvement in feminist, gay rights, poverty and animal rights issues in society more generally.

### **Edwin Cameron**

Edwin Cameron has been a judge in South Africa since 1994, and a member of its highest court, the Constitutional Court, since 2009. Cameron practised at the Johannesburg Bar from 1983 to 1994. From 1986 he was a human rights lawyer based at the University of the Witwatersrand's Centre for Applied Legal Studies (CALS), where he was awarded a personal professorship in law. His practice included labour and employment law; defence of ANC fighters charged with treason; conscientious and religious objection; land tenure and forced removals; and gay and lesbian equality. From 1988 he advised the National Union of Mineworkers (South Africa) on AIDS/HIV, and helped draft and negotiate the industry's first comprehensive AIDS agreement with the Chamber of Mines. While at CALS, he drafted the Charter of Rights on AIDS and HIV, co-founded the AIDS Consortium (a national affiliation of non-governmental organisations working in AIDS), which he chaired for its first three years, and founded and was the first director of the AIDS Law Project. He oversaw the gay and lesbian movement's submissions to the Kempton Park negotiating process. This, with other work, helped secure the express inclusion of sexual orientation as a protected interest in the South African Constitution. In September 1994, he was awarded silk (senior counsel status). President Mandela appointed him an acting judge and later a judge of the High Court. In 1999–2000 he served for a year as an Acting Justice at the Constitutional Court. In 2000 he was

appointed a Judge of Appeal in the Supreme Court of Appeal. He is the author of *Witness to AIDS* (IB Tauris, 2005), and of *Justice – A Personal Account* (NB Publishers, 2014).

### David Cole

David Cole is Professor of Law at Georgetown University Law Center, teaching constitutional law, national security, and criminal justice. He is a regular contributor to the *New York Review of Books*, and the legal affairs correspondent for *The Nation*. He has been published widely in law journals and the popular press, and is the author of seven books. His book, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New York Press, 2004) won the American Book Award.

### Colm O’Cinneide

Colm O’Cinneide is a Reader in Law at University College London, he has published extensively in the field of human rights and anti-discrimination law, and is currently the General Rapporteur of the European Committee on Social Rights of the Council of Europe. He is also currently Vice-President of the European Committee of Social Rights and a member of the Blackstone Chambers Academic Panel. Colm has served as specialist legal adviser to the Joint Committee on Human Rights of the UK Parliament and has also acted as consultant to a range of organisations, including the Northern Irish Human Rights Commission, the UK Equality and Human Rights Commission and the Irish Equality Authority.

### Carolyn Evans

Carolyn Evans is Dean of Melbourne Law School and Harrison Moore Professor of Law. A graduate of Melbourne and Oxford, Carolyn is the author of *Religious Freedom under the European Court of Human Rights* (Oxford University Press, 2001), *The Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) and co-author of *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (LexisNexis, 2008). She is co-editor of *Religion and International Law* (Kluwer, 1999); *Mixed Blessings: Laws, Religions and Women’s Rights in the Asia-Pacific Region* (Martinus Nijhoff, 2006) and *Law and Religion in Historical and Theoretical Perspective* (Cambridge University Press, 2008). She is an internationally recognised expert on religious freedom and the relationship between law and religion and has spoken on these topics in the United States, United Kingdom, Russia, China, Greece, Vietnam, India, Hong Kong, Switzerland, Malaysia, Nepal and Australia.

### Tom Hickman

Tom Hickman is a practising barrister at Blackstone Chambers in which capacity he has acted in a number of significant cases, including representing AF in *AF (No 3) v Home Secretary* [2010] 2 AC 269 (fairness in control order cases), Binyam Mohamed in *R (Binyam Mohamed) Foreign Secretary* [2010] QB 218 (public interest immunity), Mr Lumba in *Lumba (sub nom WL) (Congo) v Home Secretary* [2012] 1 AC 245 (immigration detention), Human Rights Watch and Justice in *RB & U (Algeria) v Home Secretary* [2010] 2 AC 110 (SIAC and diplomatic assurances) and pension campaigners

in *R (Bradley & Others) v Minister for Work and Pensions* [2009] QB 114 (status of Parliamentary Ombudsman reports). He also acts for central and local government. Hickman is Reader in Public Law at the UCL Faculty of Laws, with research interests in public law, human rights, national security law and constitutional theory.

### **Jeff King**

Jeff King is a Senior Lecturer in Law at University College London. He is a member of the Bar of New York, and writes and lectures on UK and comparative public law and constitutional theory. He is the author of *Judging Social Rights* (Cambridge University Press, 2012). He is co-Editor of *Current Legal Problems*. Previously, he was a Fellow and Tutor in law at Balliol College, and CUF Lecturer for the Faculty of Law, University of Oxford (2008–11), a Research Fellow at the Centre for Socio-Legal Studies, Oxford (2008–10), and a Research Fellow and Tutor in public law at Keble College, Oxford (2007–08). He studied philosophy at the University of Ottawa and law at McGill University before working as an attorney at Sullivan & Cromwell LLP in New York City (2003–04). He then completed a doctorate on welfare rights adjudication in English public law at Keble College, University of Oxford.

### **Shiri Krebs**

Shiri Krebs is the Christiana Shi Fellow in International Studies, Stanford University, and the Law and Security Fellow, Stanford Center on International Security and Cooperation. She teaches international criminal law and international humanitarian law at Santa Clara University Law School, while writing her doctoral dissertation at Stanford Law School. Her research focuses on the impact of legal institutions on public perception of facts during armed conflicts.

### **James Krumrey-Quinn**

James Krumrey-Quinn is a legal research assistant with the Adelaide Law School, University of Adelaide. James holds an LLB (with 1st class Hons), BCom (Corporate Finance) and Diploma in Languages (Italian) from the University of Adelaide, and a Graduate Diploma in Legal Practice from the Australian National University. James is a lawyer of the New South Wales Supreme Court and is a member of the Criminal Bar Association, the Bar Human Rights Committee and the Constitutional and Administrative Law Bar Association in the UK. James's research interests include law and religion, access to justice and the criminal law, access to sustainable energy and the law, and international law and the use of force.

### **Adam Tomkins**

Adam Tomkins holds the John Millar Chair of Public Law at the University of Glasgow School of Law, having previously taught at St Catherine's College, University of Oxford (2000–03) and at King's College London (1991–2000). He specialises in constitutional law and has research interests in British, EU and comparative constitutional law, as well as in aspects of constitutional theory and constitutional history. In 2009 he was appointed a legal adviser to the House of Lords Select Committee on the Constitution.

### **Anashri Pillay**

Anashri Pillay is a Lecturer in Law at Durham University, where she teaches international law and international human rights law. Her research interests lie in the field of comparative constitutional law, particularly the adjudication of economic and social rights by national courts. Anashri has published a number of articles on, amongst other things, principles of judicial restraint; adjudication of economic and social rights; and judicial review for unreasonableness. She is a member of the Economic and Social Rights Research Network (ESRAN-UKI) and the African Network of Constitutional Lawyers (ANCL).

### **Johan van der Vyver**

Johan D van der Vyver is the IT Cohen Professor of International Law and Human Rights in the School of Law of Emory University in Atlanta, Georgia and an Extraordinary Professor in the Department of Private Law of the University of Pretoria. He was formerly a Professor of Law at the University of the Witwatersrand, Johannesburg and the Potchefstroom University for Christian Higher Education in South Africa. He is the author of 11 books and monographs and close to 300 chapters in books, law reviews and other articles, and book reviews. His research interests and publications include human rights, international criminal law and a great variety of other subject-matters.

### **Stephen I Vladeck**

Stephen I Vladeck is a Professor of Law and the Associate Dean for Scholarship at American University Washington College of Law. His teaching and research focus on federal jurisdiction, constitutional law, national security law, and international criminal law. A nationally recognised expert on the role of the federal courts in the war on terrorism, he was part of the legal team that successfully challenged the Bush Administration's use of military tribunals at Guantánamo Bay, Cuba, in *Hamdan v Rumsfeld*, 548 US 557 (2006), and has co-authored party and amicus briefs in a host of other major lawsuits, many of which have challenged the US government's surveillance and detention of terrorism suspects.

### **Jochen von Bernstorff**

Jochen von Bernstorff holds the chair for constitutional law, international law and human rights at the Eberhard Karls Universität Tübingen (since 2011). He studied law at Philipps-Universität Marburg and University of Poitiers, received his PhD from the University of Mannheim in 2000 and holds an LLM from the European University Institute (EUI) in Florence (2001). He was with the German Federal Foreign Office (diplomatic service 2002–07) in the Multilateral Human Rights Policy Task Force of the UN, a member of the German delegation at the UN Commission on Human Rights in 2004 and 2005 and the UN Human Rights Council in 2006, and a member of the German delegation at the UN General Assembly in 2003–05. Furthermore, he served as chief negotiator of the German delegation at negotiations over the UN Convention on the Rights of Persons with Disabilities, New York (2003–07). From 2007 to 2011 he was a senior research fellow at the Max-Planck-Institute for Comparative Public Law and Public International Law in Heidelberg. His main areas of research are in international and

comparative human rights law as well as history and theory of international law. He is the author of the monograph *The International Law Theory of Hans Kelsen: Believing in Universal Law* (Cambridge University Press, 2010).

**Paul Yowell**

Paul Yowell has been Fellow and Tutor in Law at Oriel College, Oxford since 2012. Prior to that he was Lecturer in Law at New College, and a post-doctoral fellow with the Oxford Law Faculty for the AHRC project Parliaments and Human Rights. His main areas of research are in constitutional and legal theory, comparative constitutional law, and human rights. At Oxford he teaches Constitutional Law, EU Law, Jurisprudence and Human Rights.

## *Table of Cases*

A v B [2009] UKSC 12, [2010] 2 AC 1.....	119, 124–25
A v Minister of Defense (ADA 7/88), 42(3) PD 133 (1988) .....	192
A v Secretary of State for the Home Department [2004] UKHL 56, [2005] 2 AC 68 ...	164
A v Secretary of State for the Home Department (No 2) [2005] UKHL 71, [2006] 2 AC 221.....	128–29
A v State of Israel (ADA 7750/08), unreported (2008) .....	193
A v State of Israel (CrimA 6659/06) (2008) 47 ILM 768 .....	189–90
A v United Kingdom (App no 25599/94), unreported (23 September 1998) .....	250
A v United Kingdom (App no 3455/05) (2009) 49 EHRR 29....	122–25, 130, 169, 173, 197
A obo V and A v Department of School Education [1999] NSWADT 120.....	262
Abbott v Burke (Abbott XIV), 185 NJ 612 (2005) .....	367–68, 371
Abbott v Burke (Abbott XXI), No M–1293–09, (NJ May 24 2011) .....	367–68, 371–72
Aberah v Military Commander in the West Bank (HCJ 317/13), unreported (2013) .....	195–97
Aboriginal Legal Rights Movement Inc v South Australia (No 1) (1995) 64 SASR 551.....	266
Abu-Sneina v Military Court of Appeals (HCJ 2021/10) unreported (8 April 2010).....	179
Adalah Legal Center for Arab Minority Rights in Israel v GOC Central Command (HCJ 3799/02) (2006) 45 ILM 491 .....	186
Adams v Richardson, 351 F Supp 636 (DC Cir 1972) .....	360
Adarand Constructors Inc v Peña, 515 US 200 (1995) .....	98
Additional District Magistrate, Jabalpur v SS Shukla, 1976 SCR 172 .....	343–44
Adelaide Company of Jehovah's Witnesses Inc v Commonwealth (1943) 67 CLR 116 .....	261
Adelaide Corporation v Corneloup (2011) 110 SASR 334.....	261
Agbar v IDF Commander in Judea and Samaria (HCJ 9441/07), unreported (2007) .....	191
Ahmet Arslan v Turkey (App no 41135/98), unreported (23 February 2010) .....	212
Airey v Ireland (A/32) (1979) 2 EHRR 305 .....	306, 359
Aitken v Victoria [2013] VSCA 28.....	271–73
AK Gopalan v State of Madras (Union of India: Intervener), 1950 SCR 88 .....	344
Al Odah v United States, 346 F Supp 2d 1 (DDC 2004).....	165
Al Odah v United States 559 F 3d 539 (DC Cir 2009).....	130, 165
Al Odah v United States, 608 F Supp 2d 42 (DDC 2009) .....	165
Al Rawi v Security Service [2011] UKSC 34, [2012] 1 AC 531 .....	120, 126, 128, 133, 135, 170, 175, 205
Al-Amudi v State of Israel (ADA 6409/10), unreported (2010) .....	194
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567 .....	38, 48, 54–55, 57–58, 81–82
Al-Ghabra v HM Treasury [2010] UKSC 2, [2010] 2 AC 534.....	124

Al-Haramain Islamic Foundation Inc v Bush, 507 F 3d 1190 (9th Cir 2007) .....	121
Ali v Birmingham City Council [2010] UKSC 8, [2010] 2 AC 39.....	361
Aliessa v Novello, 96 NY 2d 418 (2001).....	364
Al-Karbuteli v Minister of Defense (HCJ 7/48), 2(1) PD 5, 97 (1949–50) .....	185, 191
Al-Khouri v Chief of Staff (HCJ 95/49), 4(1) PD 34 (1950).....	191
Allen NNO v Gibbs, 1977 (3) SA 212.....	257
Allgeyer v Louisiana 165 US 578 (1897).....	105
Almitra H Patel v Union of India, AIR 2000 SC 1256 .....	291
Almitra H Patel v Union of India, unreported (15 February 2000) .....	347
American-Arab Anti-Discrimination Committee v Reno, 70 F 3d 1045 (9th Cir 1995).....	119, 133
Ameziane v Obama, 620 F 3d 1 (DC Cir 2010) .....	163
Anam v Obama, 696 F Supp 2d 1 (DDC 2010); affirmed sub nom Al-Madhwani v Obama, 642 F 3d 1071 (DC Cir 2011) .....	165
Anonymous Persons v Minister of Defense (CrimFH 7048/97), 54(l) PD 721 (2000) .....	188–90, 192–93
Anonymous v State of Israel (ADA 4414/02), 57(3) PD 673 (2002).....	193
Anonymous v State of Israel (ADA 9257/09), unreported (2009) .....	194
Anonymous v State of Israel (ADA 10198/09), unreported (2010) .....	193
Anonymous v State of Israel (ADA 2156/10), unreported (2010) .....	194
Anufrijeva v Southwark London Borough Council [2003] EWCA Civ 1406, [2004] QB 1124 .....	304, 314
Arar v Ashcroft, 585 F 3d 559 (2nd Cir 2009) .....	148
Aravali Golf Club v Chander Hass, 2007 (12) SCR 1084, 2008(1) SCC 683.....	355
Ashoka Thakur v Union of India, Writ petition (civil) no 265 of 2006 (10 April 2008) .....	349–50
Assistant Commissioner Condon(Queensland Police) v Pompano Pty Ltd [2013] HCA 7.....	124
Asylum Seekers Benefits Law Case, BVerfG, 1 BvL 10/10 (18 July 2012).....	284, 310, 312, 359–60
Attorney General (Victoria), Ex rel Black v Commonwealth of Australia (1981) 146 CLR 559.....	221, 261, 267, 270, 272, 274
Awad v Obama, 646 F Supp 2d 20, 27 (DDC 2009); affirmed, 608 F 3d 1 (DC Cir 2010); cert denied, 131 S Ct 1814 (2011) .....	176
Ayad Dudin v Military Commander in the West Bank (HCJ 8142/10), unreported (2010).....	203
Baker v Carr, 369 US 186 (1962).....	358
Bandhua Mukti Morcha v Union of India, 1984 SCR (2) 67 .....	344, 346–47
Barbier v Conneley, 113 US 27 (1885).....	104–6
Beer Purity <i>see</i> Commission v Germany (Case 178/84)	
Beit Sourik Village Council v Israel (HCJ 2056/04), 58(5) PD 807 .....	36, 43, 48–49, 56–58, 91–92, 109–10, 186
Bengwenyana Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd, Case No CCT 39/10 [2010] ZACC 26 930 .....	253
Benjamin v Downs [1976] 2 NSWLR 19.....	271–73
Bernstein v Toia, 373 NE 2d 238 (NY 1977) .....	364
Bismullah v Gates, 501 F 3d 178 (DC Cir 2007) .....	165



Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 US 388 (1971) .....	148–49
Boujlifa v France (App no 25404/94) (2000) 30 EHRR 419 .....	38, 77–78
Boumediene v Bush, 553 US 723 (2008) .....	165, 171, 180
Brandenburg v Ohio, 395 US 444 (1969) .....	67, 73, 75, 77
Brown v Board of Education of Topeka, 347 US 483 (1954) .....	302, 304, 358, 360
Brown (Governor of California) v Plata, 131 S Ct 1910 (2011) .....	362–63, 374–75
Bryan v United Kingdom (A/335-A) (1995) 21 EHRR 342 .....	361
Bryce v Episcopal Church in Diocese of Colorado, 289 F 3d 648 (10th Cir 2002) .....	244
Burmah Oil Co Ltd v Bank of England [1980] AC 1090 .....	153
Calcutta Electricity Supply Corporation (CESC) Ltd etc v Subash Chandra Bose, 1991 SCR Supp (2) 267 .....	347
Callahan v Carey, 118 AD 2d 1054 (1st Dept, App Div 1986) .....	364
Campaign for Fiscal Equity v State of New York (CFE I), 86 NY 2d 307 (Ct App 1995) .....	365–68
Campaign for Fiscal Equity v State of New York (CFE II), 719 NYS 2d 475 (Sup Ct 2001) .....	366–68
Campaign for Fiscal Equity v State of New York (CFE III), 8 NY 3d 14 (Ct App 2006) .....	293, 366–68
Cannabis decision BVerfGE 90, 145 (9 March 1994) .....	43, 48
Canterbury Municipal Council v Moslem Alawy Society Ltd (1985) 1 NSWLR 525 .....	266
Carnduff v Inspector Rock [2001] EWCA Civ 680, [2001] 1 WLR 1786 .....	121, 124–26
Central Hudson Gas & Electric Corp v Public Service Commission, 447 US 557 (1980) .....	97
CFE <i>see</i> Campaign for Fiscal Equity v State of New York	
Chahal v United Kingdom (App no 22414/93) [1996] ECHR 54 .....	124, 127
Chaoulli v Quebec (Attorney General) [2005] 1 SCR 91 .....	302
Chaplin v Royal Devon & Exeter Hospital NHS Foundation Trust [2010] ET 1702886/2009 .....	212, 225–26
Charkaoui v Canada (Citizenship and Immigration) (No 1), 2007 SCC 9, [2007] 1 SCR 350 .....	119–22, 124–25, 129, 161–62, 164, 166–67, 171, 205
Charkaoui v Canada (Citizenship and Immigration) (No 2) 2008 SCC 38 .....	129–30, 167
Christian Education v Minister of Education, 2000 (4) SA 757 .....	257
Christian Youth Camps Ltd v Cobaw Community Health Services Ltd [2014] USCA 75 .....	262, 264–66, 269, 275
Church of the New Faith v Commissioner of Pay-roll Tax (Vic) (1983) 154 CLR 120 .....	266, 269
Columbia Broadcasting System Inc v Democratic National Committee, 412 US 94 (1973) .....	97
Combs v Central Texas Annual United Methodist Conference, 173 F 3d 343 (5th Cir 1999) .....	244
Commander of IDF in the Judea and Samaria Area v Military Court of Appeals (HCJ 1389/07), unreported (2007) .....	192
Commission v Germany (Case 178/84) [1987] ECR 1227 .....	92–93
Common Cause v Union of India, 1996 (1) SCR 89 .....	347



Communist Party of the United States v Subversive Activities Control Bd, 367 US 1 (1961) .....	90
Condon v Pompano Pty Ltd [2013] HCA 7 .....	128
Connors v United Kingdom (App no 66746/01) (2004) 40 EHRR 9 .....	306
Consumer Education and Research Centre v India (1995) 3 SCC 42 .....	344
Conway v Rimmer [1968] AC 910 .....	152–53, 157
Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints v Amos, 483 US 327 (1987) .....	245
Craig v Boren, 429 US 190 (1976) .....	96
Dandridge v Williams, 397 US 471 (1970) .....	304, 359
Defense of Government Schools (DOGS) Case <i>see</i> Attorney General (Victoria); ex rel Black v Commonwealth of Australia	
Delhi Development Horticulture Employees' Union v Delhi Administration, Delhi, 1992 SCR (1) 565 .....	345
Demir v Turkey (App no 34503/97) (2009) 48 EHRR 54 .....	101
DeShaney v Winnebago County Department of Social Services, 489 US 189 (1989) .....	292–93, 303, 359–60
Director of Housing v Sudi [2011] VSCA 266 .....	264
District of Columbia v Heller, 554 US 570 (2008) .....	99–100
Dixon v Anti-Discrimination Commissioner of Queensland [2004] QSC 58 .....	262
Du Plessis v Synod of the Dutch Reformed Church, 1930 CPD 403 .....	255
Duncan v Cammell, Laird & Co Ltd [1942] AC 624 .....	153
Dupuis v France (App no 1914/02) (2008) 47 EHRR 52 .....	101
El-Afi v Military Commander in the West Bank (HCJ 6068/06), unreported (2006) .....	195
El-Amla v IDF Commander in Judea and Samaria (HCJ 2320/98), 52(3) PD 346, 350 (1998) .....	182
Eldredge v Koch, 98 AD 2d 675 (1st Dept, App Div 1983) .....	364
Eldridge v British Columbia [1997] 3 SCR 624 .....	283, 302
El-Masri v Tenet, 479 F 3d 296, 302 (4th Cir 2007) .....	147–53
Equal Employment Opportunity Commission v Catholic University, 83 F 3d 455 (DC Cir 1996) .....	244
Equal Employment Opportunity Commission v Roman Catholic Diocese of Raleigh Inc, 213 F 3d 795 (4th Cir 2000) .....	244
Estelle v Gamble, 429 US 97 (1976) .....	362
Evans v New South Wales (2008) 168 FCR 576 .....	266
Eweida v United Kingdom (App nos 48420/10, 36516/10, 51671/10, 59842/10) [2013] ECHR 37 .....	212, 226
Farhi Saeed Bin Mohammed v Obama, 704 F Supp 2d 1 (2009) .....	137, 141
Feldbrugge v The Netherlands (A/99) (1986) 8 EHRR 425 .....	361
Five Pensioners' Case v Peru, 28 February 2003, Inter-Am Ct HR (Series C) no 98 .....	306
Francis Coralie Mullin v The Administrator, Union Territory of India, 1981 SCR (2) 516 .....	344
Frisby v Schultz, 487 US 474 (1988) .....	97
Gazawi v Military Commander in the West Bank (HCJ 1546/06), unreported (2006) .....	195

Gellington v Christian Methodist Episcopal Church, 203 F 3d 1299 (11th Cir 2000) .....	244
General Dynamics Corp v United States, 563 US__ (2011) .....	123, 126, 147
Gideon v Wainwright, 372 US 335 (1963) .....	303
Glasgow Corporation v Central Land Board, 1956 SC (HL) 1 .....	153
Golaknath v State of Punjab, 1967 SCR (2) 762 .....	341–42
Goldberg v Kelly, 397 US 254 (1970) .....	293, 302, 359, 361–62, 371
Gosselin v Quebec (Attorney General) [2002] 4 SCR 429 .....	303–4
Governing Body of the Juma Musjid Primary School v Essay NO, 2011 (8) BCLR 761 (CC) .....	323
Grace Bible Church v Reedman (1984) 36 SASR 376 .....	261, 266
Greene v McElroy, 360 US 474 (1959) .....	123, 133
Grutter v Bollinger, 539 US 306 (2003) .....	98
Guantanamo Bay Detainee Cases, In re, 344 F Supp 2d 174 (DDC 2004) .....	165
Guantanamo Bay Detainee Litigation, In re, 577 F Supp 2d 143 (DDC 2008) .....	165
Guantanamo Bay Detainee Litigation, In re, 624 F Supp 2d 27 (DDC 2009) .....	166
Guantanamo Bay Detainee Litigation, In re, 630 F Supp 2d 1 (DDC 2009) .....	166
Guantanamo Bay Detainee Litigation, In re, 634 F Supp 2d 17 (DDC 2009) .....	166
Guantanamo Bay Detainee Litigation, In re, 787 F Supp 2d 5 (DDC 2011) .....	165
Guantanamo Bay Detainee Litigation, In re, No 08–442, 2009 WL 50155, 9 January 2009 (DDC 2009) .....	166
Gundwana v Steko Development CC [2011] ZACC 14, 2011 (3) SA 608 (CC) .....	331
Haider v Combined District Radio Cabs Pty Ltd t/a Central Coast Taxis [2008] NSWADT 123 .....	262
Hamdi v Rumsfeld, 542 US 507 (2004) .....	171
Handyside v United Kingdom, A/24 (1976) 1 EHRR 737 .....	73
Hartz IV, BVerfG, 1 BvL 1/09, 9 February 2010 .....	284, 310–12, 315, 359–60
Hatton v United Kingdom (App no 36022/97) (2003) 37 EHRR 611 .....	304
HLR v France (App no 24573/94) (1998) 26 EHRR 29 .....	250
HM Treasury v Ahmed [2010] UKSC 2, [2010] 2 AC 534 .....	169
Hollins v Methodist Healthcare Inc, 474 F 3d 223 (6th Cir 2007) .....	244–45
Home Office v Tariq [2011] UKSC 35, [2012] 1 AC 452 .....	123–25, 128, 130–31, 157
Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission, 132 S Ct 694 (2012) .....	211, 217, 219–20, 230–31, 244–46, 267–69
Hozack v Church of Jesus Christ of Latter-Day Saints (1997) 79 FCR 441 .....	263, 269
Hudson v Sipprell, 76 Misc 2d 684, 351 NYS 2d 915 (1974) .....	364
Hutterian Brethren <i>see</i> Alberta v Hutterian Brethren of Wilson Colony	
Illinois State Board of Elections v Socialist Workers Party, 440 US 173 (1979) .....	44, 99
Indian Council for Enviro-Legal Action v Union of India, 1996 (2) SCR 503 .....	347
Indira Nehru Gandhi v Raj Narain, 1975 AIR 1590 .....	342
Indira Nehru Gandhi v Raj Narain, 1975 AIR 2299 .....	342
International Transport Workers Federation, Finnish Seamen's Union v Viking Line (Case C–438/05) [2007] ECR I–10779 .....	309
Irwin Toy v Quebec [1989] 1 SCR 927 .....	47, 359
Jackson v City of Joliet, 715 F 2d 1200, 1203 (7th Cir 1983) .....	321
Jacobs v Old Apostolic Church of Africa, 1992 (4) SA 172 .....	255

Jaftha v Schoeman; Van Rooyen v Stoltz [2004] ZACC 25, 2005 (2) SA 140 (CC) .....	330–31, 333
Jamile v African Congregational Church, 1971 (3) SA 836.....	257
Jenkins v Missouri <i>see</i> Missouri v Jenkins	
Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd [2011] ZACC 33, 2012 (2) SA 104 (CC) .....	330
Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651, [1987] 1 QB 129.....	153
Jones v Scully (2002) 120 FCR 243 .....	262
Jones v Wolf, 443 US 595 (1979).....	257
Joseph v City of Johannesburg [2009] ZACC 30, 2010 (4) SA 55 (CC) .....	329, 336
K (Infants), In re [1963] Ch 381 .....	120
Kadi v Council and Commission of European Communities (Case C–402/05) [2008] ECR I–6365 .....	123
Kanda v Government of Malaya [1962] AC 322 .....	170
Kant v Lexington Theological Seminary, KY 2011–CA–000004–MR (2012) .....	231
Kawasma v Minister of Defense (CrimA 1/82), 36(1) PD 666 (1982).....	188, 192
Kedroff v Saint Nicholas Cathedral of Russian Orthodox Church in North America, 244 US 94 (1952) .....	243, 245–46, 257
Kesavananda Bharati Sripadagalvaru v State of Kerala, AIR 1973 SC 1461.....	341–43
Keun-Tae Kim v Republic of Korea, Communication No 574/1994 (4 January 1999).....	74
Khadri v IDF Commander in Judea and Samaria (HCJ 11006/04), unreported (2004) .....	190–91
Khosa v Minister of Social Development [2004] ZACC 11, (2004) 6 BCLR 569 (CC) .....	295, 314, 333, 336
Kirby v Lexington Theological Seminary, KY 2010–CA–001798–MR (2012) .....	231
Kruger v Coetzee 1966 (2) SA 428 (A) .....	335
Kruger v Commonwealth (1997) 190 CLR 1.....	261
Ladue v Gilleo, 512 US 43 (1994) .....	97
Land Election Case, BVerfGE 3, 383 (1954).....	103
Latif v Obama, 677 F 3d 1175 (DC Cir 2012), cert denied, 132 S Ct 2741 (2012).....	163
Lau v Nicholls, 414 US 563 (1974) .....	361, 369
Lautsi v Italy (App no 30814/06) (2012) 54 EHRR 3 .....	211, 217–19, 221, 224, 271–74
Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet (Case C–341/05) [2007] ECR I–11767 .....	309
Lawrence v Texas 539 US 558 (2003) .....	97–98
Lebenslange Freiheitsstrafe [1977] BVerfGE, 45, 187.....	73
Lemon v Kurtzman, 403 US 602 (1971) .....	274
Leyla Şahin v Turkey (App no 44774/98) (2007) 44 EHRR 5, 19 BHRC 590, [2006] ELR 73 .....	212, 277
Liggett Co v Baldrige, 278 US 105 (1928) .....	111–12
Lindsey v Normet, 405 US 56 (1971) .....	359
Lithgow v United Kingdom (App no 9006/80) (1986) 8 EHRR 329.....	91
Lochner v New York, 198 US 45 (1905) .....	14, 39–40, 87, 95, 104, 106–14, 358
Lombardi Vallauri v Italy (App no 39128/05) (20 October 2009) .....	232–33, 236
Loyalitätspflicht, BVerfGE 70, 138 (4 June 1985) .....	247–48

Luftsicherheitsgesetz [2005] BVerfGE 115, 118 .....	73
Lüth [1958] BVerfGE 7, 198 .....	64, 72
Mahjoub, In the Matter of, DES 7–08, Order, (3 October 2008) .....	168
Makhmudov v Russia (App no 35082/04) (2008) 46 EHRR 37 .....	111
Manchester City Council v Pinnock [2010] UKSC 45, [2011] 2 AC 104 .....	303
Maneka Gandhi v Union of India (1978) 1 SCC 248 .....	344
Mankatshu v Old Apostolic Church of Africa, 1994 (2) SA 458 .....	255
Mar’ab v IDF Commander in the West Bank (HCJ 3239/02), 57(2) PD 349 .....	182, 184–85, 189–91, 193
Mara’abe v Prime Minister of Israel (HCJ 7957/04) (2006) 45 ILM 202 .....	186
Maryland and Virginia Churches v Sharpsburg Church, 396 US 367 (1970) .....	257
Mathews v Eldridge, 424 US 319 (1976) .....	97, 171, 362
Mayeka v Belgium (App no 13178/03) (2008) 46 EHRR 23 .....	89
Mazibuko v City of Johannesburg [2009] ZACC 28, 2010 (4) SA 1 (CC) .....	288–90, 312, 325–29, 336–37
MC Mehta v Union of India, 1987 SCR (1) 819 .....	343
McCain v Dinkins, 84 NY 2d 216 (Ct App 1994) .....	365
McCain v Koch, 502 NYS 2d 720 (App Div 1986) .....	364–65
McClure v Salvation Army, 460 F 2d 553 (5th Cir 1972) .....	243
McCreary County v American Civil Liberties Union of Kentucky, 45 US 844 (2005) .....	212
McKinney v University of Guelph [1990] 3 SCR 229 .....	46
MEC for Education: Kwazulu-Natal v Pillay (CCT 51/06) [2007] ZACC 21, 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC) .....	212, 224, 256, 275–76
Military Commander in the West Bank v Military Court of Appeals, unreported (2007) .....	193
Miller v California, 413 US 15 (1973) .....	90
Milliken v Bradley, 418 US 717 (1974) .....	360
Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association (1987) 17 FCR 373 .....	261
Minister of Citizenship and Immigration v Mohamed Harkat, No 34884, pending .....	167–68
Minister of Health v Treatment Action Campaign (No 2) [2002] ZACC 15, 2002 (5) SA 721 (CC) .....	288, 324–26, 328, 330, 333, 336–38
Miranda v Arizona, 384 US 436 (1966) .....	358
Missouri v Jenkins, 515 US 70 (1995) .....	333–34, 360–61, 372–74
Mohamed v Jeppesen Dataplan Inc (en banc rehearing) 614 F 3d 1070 (9th Cir 2010) .....	121, 124, 126, 147–54
Mohini Jain v State of Kerala (1992) 3 SCC 666 .....	344
Momcilovic v The Queen (2011) 245 CLR 1 .....	264, 277
Montoy v Kansas, 278 Kan 769, 102 P 3d 1160 (Kan 2005) .....	294, 367–68, 372
Moore v President of the Methodist Conference [2012] QB 735 .....	210–11
MSS v Greece and Belgium (App no 30696/09) (2011) 53 EHRR 2 .....	310
Mugler v Kansas, 123 US 623 (1887) .....	105–6
Muller v Oregon, 208 US 412 (1908) .....	110
Narmada Bachao Andolan v Union of India (2000) 10 SCC 664 .....	291, 347–48, 351–53
Natal v Christian and Missionary Alliance, 878 F 2d 1575 (1st Cir 1989) .....	244

Nederduitsche Hervormde Church v Nederduitsche Hervormde of Gereformeerde Church (1893) 10 Cape Law Journal 327 .....	257
New York v Ferber, 458 US 747 (1982) .....	76
NGK in Afrika (OVS) v Verenigde Geref Kerk in Suider-Afrika, 1999 (2) SA 156.....	255
Nixon (Attorney General of Missouri) v Shrink Missouri Government PAC, 528 US 377 (2000).....	99
Nokotyana v Ekurhuleni Metropolitan Municipality [2009] ZACC 33, 2010 (4) BCLR 312 (CC).....	327–29
Noone v Operation Smile (Australia) Inc [2012] VSCA 91 .....	264
Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133.....	118, 135–37, 144–46, 154–58
Novartis AG v Union of India; NATCO Pharma Ltd; MS Cancer Patients Aid Association v Union of India unreported .....	353–54
O’Rourke v United Kingdom (App no 39022/97), unreported (26 June 2001).....	303
Obst v Germany (App no 425/03), unreported (23 September 2010).....	210, 220, 235–36, 248–51, 270
Occupiers of 51 Olivia Road v City of Johannesburg 2008 (3) SA 208 (CC) .....	290, 295, 314, 331, 337
Odendaal v Loggerenberg NNO (1), 1961 (1) SA 712 (0) 719 .....	255
Official Solicitor v K [1963] Ch 381 .....	170
Old Apostolic Church of Africa v Non-White Old Apostolic Church of Africa, 1975 (2) SA 684 .....	257
Olga Tellis v Bombay Municipal Corporation, AIR 1986 SC 180.....	291, 302, 310, 345–46, 352, 356
Öneryildiz v Turkey (App no 48939/99) (2004) 39 EHRR 253 .....	306
Osama Rashek v State of Israel (ADA 2627/09), unreported (2009).....	193
OV v Members of the Board of Wesley Mission Council (2010) 270 ALR 542.....	262
OW v Members of the Board of the Wesley Mission Council [2010] NSWADT 293.....	262
Paschim Banga Ket Mazdoor Samity v State of West Bengal (1996) 4 SCC 37 .....	344, 346, 352, 356
Patterson v Kentucky, 97 US 501 (1878) .....	105
Pentiacova v Moldova (App no 14462/03) (2005) 40 EHRR SE 23 .....	303
People’s Union for Civil Liberties (PUCL) v Union of India (2001) 5 SCALE 303, 7 SCALE 484.....	348–49
People’s Union for Civil Liberties v Union of India, WP(C) no 196/2001 (28 November 2001) .....	290–91
Petruska v Gannon University, 462 F 3d 294 (3rd Cir 2006) .....	244
Pharmacy Case (Apothekenurteil), BVerfGE 7, 377 (1958) .....	103, 105–6, 111–12, 114
Poirrez v France (App no 40892/98) (2005) 40 EHRR 34 .....	302
Presbyterian Church v Hull Church, 393 US 440 (1969) .....	257
Prosecutor v Duško Tadić (Jurisdiction) (Case No IT–94–1–A), 2 October 1995 .....	258
Public Committee Against Torture in Israel v Israel (HCJ 769/02) (11 December 2005).....	66
R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 65, [2010] EWCA Civ 158, [2011] QB 218 .....	121–24, 126, 133, 135, 137–46, 152–59

R (KM) v Cambridgeshire County Council [2012] UKSC 23 .....	303
R (Limbuela) v Secretary of State for the Home Department [2005] UKHL 66, [2006] 1 AC 396.....	283, 302–3, 310, 314, 316, 359
R (Omar) v Secretary of State for Foreign and Commonwealth Affairs [2012] EWHC 1737 (Admin) .....	155–56
R (Rogers) v Swindon NHS Primary Care Trust [2006] EWCA Civ 392, [2006] 1 WLR 2649 .....	303, 304
R (W) v Birmingham City Council [2011] EWHC 1147 (Admin) .....	303
R v Ahmad 2011 SCC 6.....	131
R v AM [2010] ACTSC 149 .....	265
R v Basi [2009] 3 SCR 389 .....	172
R v Big M Drug Mart Ltd [1985] 1 SCR 295 .....	41
R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International Intervening) (No 3), [1999] 2 All ER 97 .....	258
R v Cambridge Health Authority, ex parte B [1995] 1 WLR 898.....	304
R v Chief Constable of West Midlands Police, ex parte Wiley [1995] 1 AC 274 .....	152–53, 158
R v North and East Devon Health Authority, ex parte Coughlan [2000] 2 WLR 622.....	303
R v Oakes [1986] 1 SCR 103.....	34, 41, 43, 57–58, 74
R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants [1997] 1 WLR 275 .....	302
R v Stinchcombe, [1991] 3 SCR 326 .....	168, 174
R v Winneke, ex parte Gallagher (1982) 152 CLR 211 .....	261
Rafeedie v Immigration & Naturalization Service, 880 F 2d 506 (DC Cir 1989) .....	120
Rasul v Bush, 542 US 466 (2004) .....	165
Rayburn v General Conference of Seventh-Day Adventists, 772 F 2d 1164 (1985) .....	244–45
RB (Algeria) v Secretary of State for the Home Department [2009] UKHL 10, [2010] 2 AC 110.....	124, 131–32, 157
Reed v Campbell, 476 US 852 (1986).....	96
Reno v American Civil Liberties Union, 521 US 844 (1997).....	99
Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (2009) 9 BCLR 847 (CC), (2010) 3 SA 454 (CC) .....	314, 346
Right to Food Case <i>see</i> Narmada Bachao Andolan v Union of India	
RJR-MacDonald Inc v Canada [1994] 1 SCR 311 .....	111
Rudolf Heß Gedenkfeier [2009] BVerfGE 124, 300 .....	73, 77
Rweyemamu v Cote, 520 F 3d 198 (2nd Cir 2008) .....	244
Ryland v Edros, 1997 (2) SA 690, 703; 1997 (1) BCLR 77 .....	257–58
S v Mamabolo 2001 (3) SA 409 (CC).....	61
S v Manamela 2000 (3) SA 1 (CC).....	48
S v Williams (Case no CCT/20/94) 1995 (3) SA 632 (CC) .....	53, 79–80
Sachidananda Pandey v State of West Bengal, 1987 SCR (2) 223.....	346
Sajadiya v Minister of Defense, 42(3) PD 801 (1988) .....	191
Salach v State of Israel (ADA 1949/09), unreported (2009) .....	191, 194
Salah Hassan v The National Insurance Institute (HCJ 10662/04), 28 February 2012.....	305

Salama v IDF Commander in Judea and Samaria (HCJ 5784/03), 57(6) PD 721 .....	185, 190
Salazar, Secretary of Interior v Buono, 567 US__ (2012) .....	274
Salesi v Italy (A/257-E) (1998) 26 EHRR 187 .....	361
San Antonio Independent School District v Rodriguez, 411 US 1 (1973) .....	99, 292, 304, 359, 367
Sankalp Rehabilitation Trust v Union of India, Writ petition 512 of 1999 .....	350
Sarski v State of Israel (ADA 6406/10), unreported (2010) .....	194
Sauvé v Canada [2002] 3 SCR 519 .....	89
Scharon v St Luke's Episcopal Presbyterian Hospitals, 929 F 2d 360 (8th Cir 1991)....	244
Schleicher v Salvation Army, 518 F 3d 472 (7th Cir 2008) .....	244
Schneider v State (New Jersey), 308 US 147 (1939) .....	95–96
Schüth v Germany (App no 1620/03) (2011) 52 EHRR 32 .....	210, 220, 235–36, 248–49, 251, 270
Secretary of State for the Home Department v AF (No 3) [2009] UKHL 28, [2010] 2 AC 269 .....	122–25, 130, 132–33, 157, 169, 197
Secretary of State for the Home Department v CC and CF [2012] EWHC 2837 (Admin), [2013] 1 WLR 2171 .....	157–58
Secretary of State for the Home Department v JJ [2007] UKHL 45, [2008] 1 AC 385 .....	164
Secretary of State for the Home Department v MB [2007] UKHL 46, [2008] 1 AC 440 .....	122, 125, 127, 131
Secretary, Department of Foreign Affairs v Styles (1989) 23 FCR 251 .....	276
Serbian Eastern Orthodox Diocese for United States and Canada v Milivojevic, 426 US 696 (1976) .....	246, 257
Shaliehsabou v Hebrew Home of Washington, 363 F 3d 299 (4th Cir 2004) .....	245
Shapiro v Thompson, 394 US 618 (1969) .....	359
Shawan Rateb Abdullah Jabarin v Commander of IDF Forces in the West Bank (HCJ 5022/08) .....	120–21, 133
Sherbert v Verner, 374 US 398 (1963) .....	96
Siebenhaar v Germany (App no 18136/02), unreported (3 February 2011) .....	210, 220, 249–51
Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria, Communication 155/96 (2001) African Human Rights Law Reports 60 (ACHPR, 2001) .....	306
Sofi v State of Israel (ADA 2595/09), unreported (2009) .....	194
Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) .....	287, 323–24
South Africa v Grootboom 2001 (1) SA 46 (CC) .....	287–88, 291, 312, 323–24, 326, 328, 330, 333, 335, 337, 346–47
State of Bihar v Project Uchcha Vidya, Sikshak Sangh, Appeal (civil) 6626–6675 of 2001 (3 January 2006) .....	291, 349
State v Williams, 1995 (3) SA 632 .....	38
Stone v Graham, 449 US 39 (1980) .....	274
Strydom v Moreleta Park Congregation of Dutch Reformed Church [2009] 4 SA 510 .....	211, 220, 224, 252–54
Sullivan v Zebley, 493 US 521 (1990) .....	370



Sunil Batra v Delhi Administration, 1979 SCR (1) 392.....	344
Swann v Charlotte-Mecklenburg Board of Education, 402 US 1 (1971) .....	360
Sweezy v New Hampshire, 354 US 234 (1957) .....	96
Taweel v Military Commander in the West Bank (HCJ 9015/06), unreported (2006) .....	195
Taylor v Kurtstag, 2005 (1) SA 362; 2005 (7) BCLR 705 .....	255, 257
Tennessee v Garner, 471 US 1 (1985) .....	35, 37, 75–77
Theron v Ring van Wellington van die NG Kerk, 1976 (2) SA 1 (A) 10 .....	255, 257
Thomson Newspapers v Canada [1998] 1 SCR 877 .....	93
Tinnelly & Sons Ltd v United Kingdom (App no 20390/92) (1999) 27 EHRR 249.....	153
Totten v United States, 92 US 105 (1876) .....	117–18, 126, 146–48, 150–51
Trunk v City of San Diego, 660 F 3d 1091 .....	213
Tsfayo v United Kingdom (App no 60860/00) (2009) 48 EHRR 18.....	361
Tsubach v Military Judge (HCJ 9456/05), unreported (2005) .....	203
Turner v Rogers, 131 S Ct 2507 (2011) .....	174
Ufan v Minister of Defense (ADA 4794/05), unreported (2005) .....	193
Üner v The Netherlands (App no 46410/99) [2006] ECHR 2006–XII, 45 EHRR 14.....	77–78
United Mizrahi Bank v Migdal Cooperative Village, PD 49(4) 221, 421 (1994) .....	46
United States v Ballard, 322 US 78 (1944) .....	258
United States v Carolene Products Co, 304 US 144 (1938) .....	95, 113
United States v Hall, 26 F Cas 79 (CCSD Ala 1871) .....	250
United States v Nixon, 418 US 683 (1974) .....	147
United States v O’Brien, 391 US 367 (1968) .....	97
United States v Reynolds, 345 US 1 (1953).....	146–47, 150–51
United States v Virginia, 518 US 515 (1996) .....	97
Unnikrishnan v State of Andra Pradesh, 1993 (1) SCC 645 .....	344
Van Orden v Perry, 545 US 677 (2005) .....	16, 213, 218
Virginia State Pharmacy Bd v Virginia Citizens Consumer Council, 425 US 748 (1976) .....	97
Voluntary Health Association of Punjab v Union of India, Writ petition 311 of 2003 .....	350
Walsh v St Vincent de Paul Society Queensland (No 2) [2008] QADT 32 .....	228, 269
Warnhinweise für Tabakerzeugnisse BVerfGE 95, 173.....	45
Watson v Jones, 80 US 679 (1871)..243, 257	
Webster v Reproductive Health Services, 492 US 490 (1989).....	303
Werft v Desert Southwest Annual Conference, 377 F 3d 1099 (9th Cir 2004) .....	244
Wickard v Filburn, 317 US 111 (1942) .....	14
Widmar v Vincent, 454 US 263 (1981) .....	99
Wiley <i>see</i> R v Chief Constable of West Midlands Police, <i>ex parte</i> Wiley	
Wilkinson v Austin, 545 US 209 (2005) .....	171
Williams v Commonwealth (2012) 248 CLR 156 .....	271
Williamson v Lee Optical of Oklahoma Inc, 348 US 483 (1955) .....	112–13
Wunsiedel <i>see</i> Rudolf Heß Gedenkfeier	
Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea, Communication No 1321/2004 und 1322/2004 (2006).....	74
Yiba v African Gospel Church, 1999 (2) SA 949 .....	255



Young v Toia, 93 Misc 2d 1005, 403 NYS 2d 390 (1977).....	364
Z v United Kingdom (App no 29392/95) [2001] 2 FCR 246, (2001) 34 EHRR 97 .....	303, 359–60
Zayad v Military Commander in the West Bank (HCJ 907/90), (1990) .....	192
Zelman v Simmons-Harris, 536 US 639 (2002) .....	274

# Table of Legislation

## National

### *Australia*

Age Discrimination Act 2004 (Cth).....	262
Anti-Discrimination Act 1977 (NSW) .....	262–63
s 31A .....	263
s 31K .....	263
s 46A .....	263
s 49ZO.....	263
s 56(a)–(d).....	263
Charter of Human Rights and Responsibilities Act 2006 (Vic).....	264–65, 276–77
s 6.....	265
(2) .....	264
s 7.....	273
(2) .....	264–65, 277
s 8.....	273
(2) .....	265
s 14.....	264, 276
(1)(b).....	276
(2) .....	276
s 19(1) .....	265
(2)(d).....	265
s 32(1) .....	264, 276
(2) .....	265
s 36.....	264
s 38.....	264, 277
(1) .....	276
s 39.....	264
(1) .....	264
Constitution Act 1900 (Cth) .....	261, 268
s 51(xxxvii) .....	262
s 116 .....	221, 259, 261, 267, 270–72, 274–75
Constitution Act 1934 (Tas)	
s 46(1) .....	261
Disability Discrimination Act 1992 (Cth).....	262
Education Act 1990 (NSW)	
s 6(1)(b) .....	273
s 30.....	272
s 32.....	272
Education and Training Reform Act 2006 (Vic)	
s 2.2.11(1) .....	272

Equal Opportunity Act 2010 (Vic) .....	262–63, 265
s 4(1) .....	262
s 6(1)(n) .....	262
s 8 .....	262
s 9(3)(b) .....	276
(c) .....	276
(e) .....	276
s 38(2)(c) .....	273
s 39 .....	263
s 42 .....	263, 276
s 75 .....	276
s 82 .....	263
s 83 .....	263
Equal Opportunity for Women in the Workplace Act 1999 (Cth) .....	262
Fair Work Act 2009 (Cth) .....	262–63
s 153 .....	262
(2)(a) .....	263
(c) .....	263
s 195 .....	262
(2)(a) .....	263
(c) .....	263
s 351 .....	262
(2)(a) .....	262
(b) .....	263
(c) .....	263
s 772 .....	262
(2)(b) .....	263
(c) .....	263
Human Rights Act 2004 (ACT) .....	264–66
Pts 4–6 .....	264
s 7 .....	265
s 8(2) .....	265
s 14 .....	264–65
s 27 .....	265
s 27A .....	266
s 28 .....	264–65
(1) .....	277
s 30 .....	264
s 32 .....	264
s 40B .....	264
s 40C(2)(a) .....	264
Public Instruction Act 1880 (NSW) .....	271
Racial Discrimination Act 1975 (Cth) .....	262
Sex Discrimination Act 1984 (Cth) .....	262–63
s 7(a) .....	263
(b) .....	263
(d) .....	263

s 37(a) .....	263
(b) .....	263
(d) .....	263
s 38 .....	263

*Belgium*

Constitution 1994

Art 23 .....	301
--------------	-----

*Canada*

Canadian Charter of Rights and Freedoms 1982 .....	18, 23, 81, 161, 177
s 1 .....	124, 167, 170
s 7 .....	166–67, 170, 303
s 15 .....	283, 304
(1) .....	283
Immigration Act 1976 .....	127
Immigration and Refugee Protection Act 2001 .....	164, 166
ss 76–85 .....	166
s 83 .....	166
s 85 .....	167
(4) .....	167
(5) .....	167

*France*

Declaration on the Rights of Man and of the Citizen 1789 .....	285
--	-----

*Germany*

Apothecary Act (Bavaria)

s 3(1) .....	103–4
--------------	-------

Basic Law 1949 (Grundgesetz) .....

Art 1 .....	10, 17–18, 68, 102, 114
-------------	-------------------------

(1) .....	73, 310, 312
-----------	--------------

(3) .....	284
-----------	-----

Art 12 .....	68
--------------	----

Art 17a .....	103, 106
---------------	----------

Art 18 .....	102
--------------	-----

Art 19 .....	102
--------------	-----

Art 20(1) .....	102
-----------------	-----

Art 20(1) .....	284
-----------------	-----

Art 140 .....	
---------------	--

247 .....

Constitution 1919 (Weimar)

Art 137(3) .....	247–48
------------------	--------

Arts 137–41 .....	247
-------------------	-----

General Law 1794 (Prussia) .....

Ch 2, Title 17, para 10 .....	102
-------------------------------	-----

*Greece*

## Constitution 2001

Art 21 .....	301
Art 22 .....	301

*Hungary*

Constitution 2011 .....	18
Fundamental Law (CDL-REF(2013)016)	
Fourth Amendment, Art 17 .....	309

*India*

Constitution 1950 .....	18, 339–42
Pt 3 .....	301, 340
Pt 4 .....	299, 340
Art 21 .....	344–45
Art 21A .....	345
Art 37 .....	340
Art 39(e) .....	346
(f) .....	346
Art 41 .....	346
Art 42 .....	346
First Amendment .....	341
Fourth Amendment .....	341
Seventeenth Amendment .....	341
Thirty-Ninth Amendment .....	342
Ninety-Third Amendment .....	349
Famine Code .....	291, 348

*Ireland*

Constitution 1937 .....	18, 340
-------------------------	---------

*Israel*

Emergency Powers (Detentions) Law 1979, 5739–1979 .....	185–86
s 2(a) .....	186
s 4(a) .....	186
s 5 .....	186
s 6 .....	186
(c) .....	186
Incarceration of Unlawful Combatants Law 2002, 5762–2002 .....	187, 189–90
Art 2 .....	187
Art 3(a) .....	187
Art 5(a) .....	187
(c) .....	187
(e) .....	187
Art 7 .....	189
Military Order regarding Preventive Detention (Judea and Samaria) (No 591), 5767–2007	

s 1.....	186
(a).....	186
(b).....	186
s 4(a).....	186
s 5.....	186
ss 7–8.....	186

*Netherlands*

Constitution 1983

Art 19 .....	301
Art 20 .....	301
Art 22 .....	301

*Portugal*

Constitution 1976

Art 56 .....	301
Art 59 .....	301
Arts 63–72 .....	301
Arts 108–9 .....	301
Art 167 .....	301
Art 216 .....	301

*South Africa*

Civil Union Act 17 of 2006

s 6.....	254
----------	-----

Constitution (Interim) 1993

Art 10 .....	79
Art 11(2) .....	79
Art 33 .....	79

Constitution 1996 .....17, 53, 220, 253, 255, 296, 335–36, 341, 355

s 7(2).....	322
s 9.....	275
(4).....	253
(5).....	275
s 15(1).....	255–56
s 26.....	287, 312, 319, 340
s 26(2).....	323
s 27.....	312, 319
(a).....	287–88
s 27(2).....	323
s 29.....	319
(1).....	323
s 31(1)(b).....	255
s 32(1).....	275
s 35(1)(a).....	257
s 36.....	255

Criminal Procedure Act 1977.....79

Income Tax Act 58 of 1962	
Ninth Sched, Pt I, para 5.....	254
Magistrate's Courts Act 32 of 1944	
s 66(1)(a).....	331
Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.....	211, 253–56
s 1(xxii).....	253
s 6.....	275
s 8.....	253
s 9.....	275
s 13(2)(a).....	275
s 13(2)(b)(ii).....	254
s 14.....	275
s 14(2)(c).....	254
(3)(b).....	254
(f).....	254
s 15.....	275
s 30.....	275
Social Assistance Act 59 of 1992.....	336

*United Kingdom*

Anti-Terrorism, Crime and Security Act 2001	
s 23.....	164
Bakeshop Regulation Act 1863.....	106
Employment Equality (Religion or Belief) Regulations 2003.....	212
Human Rights Act 1998.....	10, 18, 283
Justice and Security Act 2013.....	135, 155–59, 164
s 6(5).....	163
s 8.....	130
s 17.....	135
(2).....	136
(3)(e).....	136
(4).....	136
(5).....	136
Prevention of Terrorism Act 2005.....	157, 164, 168
s 1.....	164
Special Immigration Appeals Commission Act 1997.....	156, 164, 168
Special Immigration Appeals Commission Rules 2003 (SI 2003/1034)	
r 4(1).....	157
Terrorism Prevention and Investigation Measures Act 2011.....	157
Terrorist Asset-Freezing Act 2010.....	168

*United States*

Alien Tort Statute (28 USC § 1350).....	148, 150
Americans with Disabilities Act 1990 (42 USC §12101).....	211, 244, 370–71
Bakeshop Act 1895 (NY).....	39–40, 106–10
Bill of Rights <i>see</i> Constitution	

Civil Rights Act 1964 (USC § 2000e) .....	243–45
Title VII.....	243
s 702 .....	243, 245
Classified Information Procedures Act 1980 (18 USC App III § 6(c)(1).....	130
Constitution 1787 .....	162, 177, 218, 285, 321
Bill of Rights.....	12–13, 90, 246, 321
First Amendment .....	90, 95–96, 213, 216, 230, 244–46, 257, 259, 267–68, 274
Second Amendment .....	99–100
Fourth Amendment .....	75
Fifth Amendment .....	148, 170
Sixth Amendment .....	174
Fourteenth Amendment.....	96, 104–5, 292–93
Constitution (Kansas) .....	294
Constitution (NY)	
Art XI, 1 .....	365
Art XVII .....	364–65
Education of all Handicapped Children Act 1975 .....	368
Military Commissions Act 2006 .....	137
Personal Responsibility and Work Opportunity Reconciliation Act 1996 .....	370
<b>European Union</b>	
Charter of Fundamental Rights 2000.....	309, 311, 360
Dir 78/2000/EC on equal treatment in employment and occupation [1978]	
OJ L303/16 .....	226
Art 4(2).....	226
Treaty of Lisbon 2007 .....	309
<b>International</b>	
Convention on the Rights of Persons with Disabilities 2006 .....	306
European Convention on Human Rights 1950 .....	18, 88, 153, 162, 174, 177, 218, 242, 248–52, 258, 361
Art 1 .....	250
Art 2.....	303
Art 3.....	22, 283–84, 303
Art 5.....	125
Art 6.....	157, 170, 233, 303
Art 8.....	38, 77–78, 89, 210, 220, 248–49, 251, 303
(2).....	89
Arts 8–11 .....	101
Art 9.....	22, 88, 210–12, 216, 220, 233, 249, 251
Art 10 .....	88, 121, 233
Art 11 .....	88, 210
Art 12 .....	88
Art 14 .....	212, 273, 303
Protocol No 1 .....	271
Art 2 .....	211
European Social Charter 1961 .....	300, 302



Additional Protocol on Collective Complaints 1996 .....	306
American Convention on Human Rights 1969	
Art 26 .....	300
San Salvador Protocol .....	300
International Covenant on Civil and Political Rights 1966 .....	17 , 184–85, 284
art 4 .....	185
(1) .....	185
art 9 .....	185
art 12(3) .....	277
art 18 .....	265–66
(4) .....	273
International Covenant on Economic, Social and Cultural Rights 1966 .....	300, 302
Optional Protocol .....	306
Universal Declaration of Human Rights 1948 .....	17, 284

## Part 1

# Introduction



# *The Pluralism of Human Rights Adjudication*

CHRISTOPHER MCCRUDDEN

**T**HIS BOOK IS primarily about judicial reasoning in ‘human rights’ cases. ‘Human rights’, we should note from the outset, includes both the application of international human rights at the domestic level, and what some jurisdictions include under an idea of domestic ‘constitutional rights’. Are there techniques that courts share, or are different techniques adopted, to decide how human rights, in this broader sense, are protected? The book aims to adopt a comparative approach to the examination of this reasoning, through a detailed examination of similar human rights issues in a range of jurisdictions. The aim of the book, then, is to examine the similarities and divergences in the reasoning developed by courts when addressing comparable human rights questions. The book shows that human rights reasoning involves distinctive and particular forms of legal reasoning, but that its form and content differ significantly from jurisdiction to jurisdiction, and over time within jurisdictions. Building upon these findings, we explore what these similarities and differences tell us about the nature, and the direction of travel, of human rights law which comprises notionally *universal* norms. The editors of the book debated whether to call it, *Adjudicating Human Rights Diversely*, which is a good indication of the major theme.

## I. METHOD AND SCOPE

### A. Differing Scholarly Approaches

Broadly, in examining these issues the contributors have adopted at least one, and usually more than one, of four methods.<sup>1</sup> All are concerned, at least to some extent, with exploring the understanding and internal coherence of legal concepts and legal reasoning: how legal concepts fit together, the consistency of the use of concepts in different areas of law, and the extent to which general principles can be extracted from legal reasoning that can be used to predict or guide future legal decision-making. Second, some (particularly those contributors in the section dealing with proportionality) are explicitly concerned with the meaning of human rights *law*: examining what, if anything,

<sup>1</sup> Christopher McCrudden, ‘Legal Research and the Social Sciences’ (2006) 122 *LQR* 632–50.

makes human rights law different from, or similar to, other normative systems, such as politics, morality and ethics. Third, several of the contributors (perhaps particularly those in the Parts of the book dealing with religion and national security) explicitly seek to examine the ethical and political acceptability of human rights delivered through legal instruments: the consideration of issues such as whether specific legal interventions are acceptable when assessed against external moral, ethical or political principles, or what should be the appropriate legal response where none exists at the moment. Policy prescription is thus often encountered, sometimes addressed to the courts, sometimes to policy-makers in government. Fourth, several contributors (particularly in the chapters by Jeff King and by Shiri Krebs<sup>2</sup>) are concerned with the *effect* of human rights law: what effect, if any, does human rights law have on human behaviour, attitudes, and actions? How does it have these effects? Are some institutional mechanisms for delivering legal outcomes more effective than others? Each of these four approaches is significantly situated in one or more domestic or regional legal contexts, but all adopt an additional explicitly comparative perspective.

## B. Why Compare?

The contributors concentrate on taking a comparative approach to human rights rather than emphasising international human rights protections as such, although there is significant discussion of approaches to human rights under the European Convention on Human Rights because that approach now underpins the jurisprudence of several of the European jurisdictions considered. The countries considered from time to time include (in no particular order): the United Kingdom, Germany, Israel, the United States, Canada, South Africa, Australia, and India. Often underlying the comparison is ‘a United States versus “the others”’ contrast, hinting at the origins of the book in a conference that was more explicitly a comparison with the United States.

We shall consider in a moment the implications of undertaking a comparative approach, but one difficulty must be acknowledged at the beginning of this discussion. We are sensitive to the criticism that our comparison is limited to the same few favoured jurisdictions that are often drawn upon in the study of comparative human rights law, and that to attempt explanations of the general human rights phenomenon based on the experience of these few states is therefore problematic.<sup>3</sup> Although in general this criticism raises a valid concern, in the context of this book it appears to us not to be so challenging. The jurisdictions concerned, importantly, share a set of relatively similar public values, such as a basically liberal perspective, a commitment to such values as the rule of law, separation of powers, and considerable experience of borrowing from each other. To the extent that these jurisdictions in particular differ significantly in their understanding of human rights, therefore, the more significant those differences become and the more they need to be explained.

<sup>2</sup> Chapters eighteen and nine respectively. Unless otherwise indicated by a footnote reference, the authors referred to in this chapter have contributed chapters to this book, and it is these chapters to which reference is being made.

<sup>3</sup> See Ran Hirschl, ‘From comparative constitutional law to comparative constitutional studies’ (2013) 11 *International Journal of Constitutional Law* 1–12 on problems with case selection.

The issue of jurisdictional selection aside, why is a comparative approach justified, and why in the context of human rights in particular? The contributors advance several different justifications for adopting a comparative approach. One common rationale for comparative law is that it is a useful tool in liberal legal reform. The aim of comparative law is to identify better legal solutions to legal problems in foreign legal systems and then to recommend their incorporation into domestic law through a process of harmonising upwards. We will return to this rationale later, but we can note that this rationale is particularly popular in the context of human rights. Carolyn Evans (in [chapter eleven](#)) describes how the use of comparative law reasoning plays an important role in the politics of human rights, where changes in one country are used to leverage change in a similar direction in another country. Comparative experience is often heavily drawn on as a source of inspiration for law reform initiatives by the legislature, particularly in Europe and the Commonwealth.

We see, too, that there is a highly significant variation on this approach, where judges, particularly those in constitutional courts or their equivalents, increasingly draw on interpretations by judges in other jurisdictions for guidance and for support. Here, comparative analysis is used not just to generate policy arguments, but as a basis for legal argument. For example, David Cole and Stephen Vladeck (in [chapter eight](#)) argue, in the context of national security cases, that where comparison demonstrates that each country can do more to secure open justice, human rights law requires them to in order to improve fairness without undermining national security. We shall return to this issue subsequently in this Introduction.

We should also note, however, that borrowing is a controversial method of law reform, for reasons that several contributors identify. In the first place, a transplant may prove inappropriate because of the different social and economic structures of the two societies in question; this is perhaps of most significance in the discussion in this book of contrasting approaches to the delivery of socio-economic rights. A second objection is that legal concepts in particular jurisdictions are often closely connected with other concepts and institutional practices; transplanting a concept from one jurisdiction to another without the other concepts and institutions with which it is connected in the ‘sending’ jurisdiction risks causing unintended consequences. Krebs, for example, points to the dangers of comparative law borrowing, in which recommendations are made to borrow from another system without fully realising the way in which the recommended system operates in practice – where borrowing the rhetoric without understanding the practice can lead to unintended consequences. Nor is the assumption that is sometimes made by human rights activists that comparative approaches will lead to *liberal* reforms, necessarily borne out in practice. Tom Hickman and Adam Tomkins (in [chapter seven](#)) provide a dramatic reconstruction of how a clash of approaches between the United Kingdom and the United States on how to deal with secret evidence led to a political and legal conflict, and how the United Kingdom approach was eventually abandoned under political pressure from the United States. In this case, comparison led to levelling down rather than levelling up.

A second rationale for comparative law is also apparent in the contributions that follow. This rationale sees the benefit of comparative law as the paradoxical objective of understanding one’s own domestic legal system better.<sup>4</sup> The comparative lawyer seeks,

<sup>4</sup> L Lazarus, *Contrasting Prisoners’ Rights* (Oxford, OUP, 2004) 19–20.

through a close analysis of the doctrines of foreign law governing a particular topic, to improve his or her appreciation of the logic of the concepts and rules of the domestic legal system in connection with that chosen topic. Evans, for example, suggests that the potential utility of scholarly comparative analysis lies in assisting in the development of a more comprehensive explanatory framework of the various options available than an examination of just one jurisdiction would provide. One example of this is provided by Jeff King, whose comparative analysis provides significant insights into empirical claims that sometimes accompany arguments about the consequences of taking certain positions on socio-economic rights. Another example is provided by Krebs, who explores empirically the different methods used to handle secret evidence in the national security context. She throws light particularly on how different jurisdictions approach the appropriate role for judicial decision-making with remarkably different presuppositions. In other words, contributors seek ‘through juxtaposition, to uncover the “strangeness in the familiar” and thereby to gain insights into the domestic legal’ environment they are asked to describe and evaluate.<sup>5</sup>

Comparative legal analysis often takes place on the assumption that the jurisdictions being compared are operating in separate spheres. In the human rights context, however, courts in different jurisdictions are much more frequently operating in very similar, often overlapping, legal spheres, which brings us to a third important rationale. Sharing overlapping legal space (*‘espace juridique’*) means that the courts are, to some extent, in competition with each other: human rights lawyers, of course, now make strategic choices as to which legal system to take their case in; the saga of how to deal with torture allegations involving United States personnel, as described by Hickman and Tomkins (in [chapter seven](#)), is a classic instance of this. They discuss the transnational human rights litigation, in which the domestic courts of the United States and the United Kingdom were brought into a dispute over access to secret information in the context of the American extraordinary rendition programme. Operating in the same legal space, leading to a degree of judicial dialogue across different jurisdictions, illustrates the clash of legal cultures over disclosure of information relating to the operation of the intelligence services.

Competition goes beyond forum shopping. If, as we shall see, there are ideological differences between the courts on human rights issues, then the competition between the courts is essentially about the use of soft power between the states in which the courts are situated. We have for some time observed a developing global ‘market’ in liberal ideologies, where states compete with each other to try to influence how far their own particular liberalism defeats competing liberalisms. The locus of where the competition takes place has shifted somewhat from politics and economics, to encompass judicial institutions as well, in particular through emerging judicial approaches to constitutional or human rights. The way that national and regional courts decide what lawyers think of as constitutional or human rights claims has now become part of the global market in liberalisms. A comparative approach makes clear what is at stake in this competition.

Comparative legal analysis is important, also somewhat paradoxically, for a fourth reason: to understand better the developing content and implications of *international* human rights law. This is the case because of two particular features of international human rights law, and its relationship with domestic law. First, there is a proliferation

<sup>5</sup> *ibid.*, 20.

of international standards on human rights, but a comparatively weak set of enforcement mechanisms available to put these norms into operation at the international level. It is clearly envisaged that the first port of call, as it were, for effective implementation of these international norms is to be at the domestic level. Several human rights treaties require the state that has ratified the treaty to implement it effectively in the country's domestic law. And even where human rights treaties provide for independent supervisory mechanisms and procedures for ruling on complaints, as a general rule those complaining must have exhausted domestic remedies before being able to complain successfully.

Courts in the jurisdictions discussed in this book do, occasionally, have recourse to international law in that sense in human rights cases. Hickman and Tomkins point to US courts considering international law in issues to do with the clash between national security and due process, and Colm O'Cinneide considers international human rights standards to be central to the discussion of social rights. There is extensive use of the ECHR at the domestic level and, of course, before the European Court of Human Rights itself. But the use of international human rights law, other than the ECHR is exceptional rather than commonplace. The human rights work is being done primarily before domestic and European regional courts, using primarily domestic legal sources. In short, much of the work of interpreting and applying human rights norms takes place at the domestic level, in significant measure in domestic courts. There is a notable absence in most of the contributions of any significant reference to litigation before international tribunals.

The second feature of international human rights law that emphasises the importance of comparative human rights is the role that domestic jurisprudence plays in the evolution of international norms. This is the case in particular in the development of customary international law, where the domestic courts may contribute to the 'state practice' that plays such a significant part in the definition of customary international law. It is also the case in the context of the interpretation of international human rights treaty law by international tribunals, given the increasing importance attached to domestic jurisprudence in assisting international tribunals to arrive at an interpretation of the international standards. In this context, international tribunals are acting in much the same way as some domestic constitutional courts interpreting domestic constitutions, where the jurisprudence of other courts is regarded as informing the approach adopted.

States interested in the development of international law will, therefore, want to be aware of the decisions of influential domestic courts because they may well end up being incorporated into customary international law, or become accepted interpretations of the international treaty law that applies to them. The United States is, for example, bound by international law. Seen from this perspective, the relevance of any differences between courts becomes somewhat more significant. The European Court of Human Rights is clearly influential beyond Europe in the development of the interpretation of international human rights law. It plays a role in establishing the international law by which the US Supreme Court is itself judged. Potentially, therefore, where the judgments of the European Court of Human Rights, based in part on the jurisprudence of domestic courts of contracting states, differ from those of the US Supreme Court, the issue becomes one of the extent to which differences between these courts may indicate that the US Supreme Court's decisions fails to live up to international human rights law obligations.



Understanding human rights law at a theoretical level may also be informed by a comparative understanding. This concern forms the fifth justification for the adoption of a comparative approach. In his contribution (in [chapter two](#)), Kai Möller distinguishes between two different approaches to comparative law scholarship that may inform this theoretical understanding. Comparison may involve engaging in the comparative analysis of the *history and application* of certain concepts and doctrines in different jurisdictions, which he characterises as involving an examination of the history of ideas. In contrast, comparison may be based on a view that there is a global conversation about rights, and the purpose of comparison is how *best* to understand and adjudicate them; here, comparative study is directed at learning the normatively best way to take rights seriously. To the extent that law is a ‘way that a society makes sense of things’, we may be able to use the way in which different countries treat a particular issue, as a way of peering into the cultural underpinnings of both our own, and other countries’ approaches to human rights.

An important problem arises in how to do comparative legal analysis of human rights cases in order to inform a deeper theoretical understanding of the nature of human rights: how far does one abstract from the detail of each particular jurisdiction in order to identify commonalities and differences? A characteristic of scholarship attempting to use comparative analysis to inform theoretical approaches in this way is the prevalence of attempts to develop ‘models’ which capture alternative ways of doing things. Krebs develops models of contrasting ways to address the problem of clashes between secrecy of intelligence material and due process rights. Christopher McCrudden and Brett Scharffs (in [chapter ten](#)) develop models of how to deal with the relationship between freedom of religion and liberal government. Murray Wesson (in [chapter fourteen](#)) adopts the model developed by Mark Tushnet distinguishing between courts that take a more prescriptive approach to rights (strong rights) and courts that take a more deferential approach (weak rights).<sup>6</sup> There is frequent reference to Möller’s model of rights as an important part of global constitutionalism.<sup>7</sup> But all these models are contestable when the sheer complexity of the practice in any particular area of human rights adjudication is understood, and the danger of essentialising and overly simplifying to the degree that the models are misleading is ever present. A good example is provided by O’Cinneide’s challenge (in [chapter fifteen](#)) to the utility of Tushnet’s weak rights/strong rights distinction as failing to capture the complexity of existing practice in the adjudication of socio-economic rights.

### C. What do We Mean by ‘Human Rights Adjudication’?

We have chosen to examine the phenomenon of ‘human rights adjudication’ in this book, but what exactly does this mean? One of the main difficulties in approaching the question we identified as our central question, and doing so comparatively, is that what we mean by ‘human rights adjudication’ is problematic because it might comprise a range of related but distinct phenomena in different jurisdictions. We need to have an understanding of what we mean by human rights adjudication if we are to compare like with like.

<sup>6</sup> Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton NJ, Princeton University Press, 2009).

<sup>7</sup> Kai Möller, *The Global Model of Constitutional Rights* (Oxford, OUP, 2012).

First, focusing on courts' adjudication of human rights issues gives rise to a series of questions. What, exactly, is a 'court' and how do we go about comparing their activities in the human rights context? Typically, four areas of comparison and contrast can be distinguished: the Court's structure and composition; its location within the political system; its procedural characteristics, and its deliberative performance.

The first area of comparison is well illustrated by Anashri Pillay who argues (in [chapter seventeen](#)), for example, that we need to be conscious of the structure of the Indian Supreme Court in understanding the results of litigation. In particular, she suggests how relaxed standing requirements, the high volume of litigation, the common use of two-judge divisions rather than the court sitting en banc, all contribute to the inconsistency of approach which she finds in her analysis of the Indian Supreme Court's dealings with socio-economic rights.

As regards the second complexity, although several of the contributors contrast decisions of the European Court of Human Rights and the United States Supreme Court, we need to be conscious that although they are both clearly courts, they are also significantly different. The European Court of Human Rights is, and considers itself to be, an international human rights court, whose main function is to resolve individual disputes between individuals and states over the treatment of individuals; the primary focus is on the relationship between the citizen and the state. The Court of Human Rights is not a constitutional court, in the sense of addressing also issues of federalism or the separation of powers, except in this restricted area. In contrast, the US Supreme Court is not an international court. The Supreme Court is, and considers itself to be, a constitutional court. This means that it considers its principal function to be not the protection of human rights as such, but rather the construction and organisation of a system of democratic government. Human rights are part of that system, but are not the whole of that system. We should not exaggerate these differences; nor should we minimise them.

The third area of comparison is also worth mentioning at this point. The procedural characteristics of litigation are often crucial in practice. It is particularly in the context of discussions of socio-economic rights that attention is increasingly given to the institutional considerations in play: issues of accessibility of the court, evidence, remedies, all affect the likelihood that human rights issues will get to court in the first place, and therefore the opportunity of courts to deal with a human rights question in the first place. King and Edwin Cameron (in [chapters eighteen](#) and [sixteen](#) respectively) emphasise the importance in both South Africa and the United States of activity by non-governmental organisations in appreciating differences between the two countries in how litigation is initiated. So too, differing approaches to what evidence is allowed and how it is presented may be crucial in explaining different outcomes. As King argues, these differences affect significantly the extent to which substantive legal approaches developed in one jurisdiction are applicable to other jurisdictions, and thus the potential for appropriate comparison (let alone borrowing between these systems).

The emphasis in this book is on the fourth area of comparison, and we shall have much to say on that issue below, but an initial difficulty in comparing courts in this respect can be observed at this stage. There are very different *styles* of judicial opinion on display in the decisions of human rights courts. We can distinguish a more personal, grand style of reason-giving by courts from a more impersonal formal style.<sup>8</sup> The United

<sup>8</sup> Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Buffalo NY, Hein Publishing, 1996 [1960]).

States Supreme Court is essentially a common law court, in the sense that it regards the interpretative and developmental role of judges as central, whereas the European Court of Human Rights is poised between being a common law court and a court in the tradition of the civil law, which downplays the centrality of judicial ‘interpretation’. There is much to ponder on here, but we can point to the highly personal tone of the Supreme Court’s opinions versus the rather more austere, even formalistic approach of the Court of Human Rights’ opinions as one likely result of the different origins and composition of the courts. Again, we should not overestimate the differences but their different origins go some way to explaining some of the differences in judicial style and behaviour that we identify subsequently. In order to explore these issues, we have adopted a broad understanding of the different institutions involved in ‘adjudicating’ human rights.

We also consider it important to capture a fuller range of legal methods giving rise to litigation concerning human rights. We have, therefore, also taken a broad, rather than a narrow understanding of ‘human rights’. As we pointed out in the introduction to this chapter, by ‘human rights’ we mean to include issues that include but also go beyond *international* human rights law.

We therefore include, for example, what would traditionally be considered to arise in rights litigation under domestic constitutional law, but in this too we adopt a broad understanding, in two respects. First, there are significant variations between jurisdictions that share a constitutional tradition of judicial protection of human rights, and even those jurisdictions that adopt a heavily constitutional and judicial approach to rights protections draw the line differently; there is a significant theoretical difference between the German Basic Law’s adoption of unamendable constitutional provisions, and the United States’ adoption of (at least theoretically) amendable constitutional protections.

Nor do we restrict ourselves to litigation challenging legislation – judicial review in its strongest sense. We include within the scope of human rights litigation several different ways of giving effect to human rights values. Paul Babie and James Krumrey-Quinn identify different ways of giving effect to Bills of Rights provisions (in [chapter thirteen](#)): (a) reading down statutory provisions so as to render them compatible with the Bill of Rights – Babie and Krumrey-Quinn draw attention to the indirect effect of Bills of Rights on ordinary statutory interpretation; Krebs discusses in the Israeli context the technique of interpreting the legislation, even against the plain meaning of the legislation, to conform to the required standard, instead of striking down the contested provision; (b) declarations of inconsistency of legislation without rendering a provision invalid, as well as (c) adjudicating actions brought directly against public authorities – an independent cause of action. Pillay (in [chapter seventeen](#)) points to the importance of the Indian Directive Principles in providing a resource for the expansive interpretation of the more narrowly framed justiciable fundamental rights. Jochen von Bernstorff (in [chapter four](#)) distinguishes adjudication of individual complaints regarding the application of legislation by the Executive Branch, from reviewing legislation for conformity with human rights standards (note the similar distinction in the UK Human Rights Act).

We do not restrict our conception of human rights litigation at the domestic level only to constitutional litigation involving claims under Bills of Rights in written constitutions because the extent to which human rights are recognised and guaranteed through constitutional law in one jurisdiction might (and does) differ significantly from other jurisdictions. Most recently, comparative human rights analysis has been carried out primarily as a branch of comparative *constitutional* law. We consider it important to get beyond

this now traditional focus on simply describing constitutional methods of protection. Jurisdictions differ in the way they divide human rights issues between different types of domestic legal regimes, with some jurisdictions tackling human rights issues through administrative law, private common law, or ordinary legislation specifically addressing a particular human rights problem, rather than through constitutional provisions. Of the jurisdictions discussed, Australia is now the best example of a jurisdiction which has no (federal) Bill of Rights and deals with human rights through a patchwork of legislative and common law methods, combined with the use of a limited range of long-standing constitutional principles like separation of powers. Merely because a particular jurisdiction does not possess American- or German-style constitutional judicial review does not mean that there are no legal remedies available. These differences do matter in terms of the approach to judicial reasoning that is adopted. It is clearly the case that the interpretative approaches to constitutional texts sometimes differ significantly from the interpretation of ordinary legislation, for example.

We adopt a broadly functional rather than a conceptual analysis of human rights litigation. The importance of this more expansive approach to what we consider human rights litigation is most apparent in the discussion of socio-economic rights. We include jurisdictions that explicitly provide for socio-economic rights as such in their constitution (South Africa), jurisdictions that protect socio-economic rights through expanded interpretation of civil and political rights (O’Cinneide provides examples, such as the right to equality, or the right to life), jurisdictions that protect socio-economic rights by way of ordinary legislation, and jurisdictions that protect important elements of socio-economic rights through the use of administrative law controls. King, in particular, shows the different ways in which the United States has advanced socio-economic rights not through constitutionalising socio-economic rights in a text but by the use of other methods, such as through the interpretation of equality, through the application of administrative due process rights in welfare benefit decision-making, in providing rights to prisoners for state-funded medical assistance, and in forms of statutory interpretation that are generous towards those claiming public resources. We do this because we consider that one of the important questions to be considered is what difference it makes to adjudication which way rights are protected.

## II. THE ADJUDICATORY PLURALISM OF HUMAN RIGHTS

By examining human rights law comparatively, we suggest that we can see better what human rights law involves at a deeper level. From this perspective, building from the contributions of those in this book, we can say that human rights law appears to be radically pluralistic, in the substantive understanding of how particular rights apply, in what ‘human rights’ means as a conceptual category, and in the structure of reasoning that courts adopt in addressing these issues.

### A. Substantive Diversity in Human Rights Adjudication

The diversity of human rights law relates, first, to the substance of the human rights decisions reached. Here are some of the ways this diversity can be identified in the contributions that follow.

First, what is a human right? This question turns out to be more problematic than might first appear to be the case. If we were to focus on gross and crude violations of human rights, such as torture, genocide, ethnic cleansing, mass rapes, and so on, then the definition of what constitutes a human right (and human rights *law*) is fairly unproblematic. Like the approach to the definition of obscenity that says ‘I can’t define it, but I know it when I see it’, we can agree that genocide is a violation of human rights without any very sophisticated reasoning or justification being necessary. What we should do about it, when international intervention is justified, for example, or whether there should be an international criminal court are real issues. But that genocide is a violation of human rights norms is now an uncontroversial proposition. In other contexts, however, not having a common conception of what human rights are can lead to real differences. In certain contexts, not all, but certainly some, there will be a theoretically related dispute about what we mean by the concept of a human right, particularly given the emotional force which an allegation of a violation of human rights now has in many countries.

Secondly, who or what can be a right-holder? Must it be an individual or can a group or a corporation be a rights claimant? We can see contrasting conceptions of human rights, individual rights versus institutional group rights, in the contribution by Babie and Krumrey-Quinn, which considers the rights of religious institutions to exercise internal powers without interference. We commonly come across similar controversies in several other situations. In abortion, the issue is raised in the context of what some have claimed as a ‘right to life’. Can a foetus be a right-holder? Where someone is in a permanent vegetative state, do they remain ‘human’, and are they right-holders? Are human rights necessarily individualistic? Do human rights attach to everyone within a particular territory, or are they restricted to those who qualify according to some other status, such as citizens, or men? In other contexts, such as the issue of minority rights, we have to consider whether groups can have rights as such. Or does the idea of group rights, or collective rights – rights that are held by the group or the collective – run counter to a basic element in an acceptable concept of human rights, namely that human rights must necessarily be individualistic, and reducible to individual rights? This dispute, as Michael Freeman has noted: ‘raises theoretical questions of who can have human rights. Such an analysis in turn raises . . . questions of which relevant entities exist, what properties they have, and which properties are necessary and sufficient conditions for having human rights’.<sup>9</sup>

Thirdly, who are the addressees of human rights? Human rights organisations like Amnesty International have been faced with the question of to what extent groups other than governments (such as terrorist organisations, or corporations) should be regarded as capable of being in violation of human rights. Do human rights norms address states and governments only, or do they address everyone, including private actors? Are human rights held against the state, or held against all? There is a fundamental tension between regarding the state as the main problem (the state as oppressor), and regarding the state as part of the solution (the state as protector).<sup>10</sup> The United States Bill of Rights has a relatively restricted view of constitutionally protected human rights; they are rights

<sup>9</sup> Michael Freeman, ‘The Philosophical Foundations of Human Rights’ (1994) 16 *Human Rights Quarterly* 491, 494.

<sup>10</sup> L. Lazarus, ‘Positive Obligations and Criminal Justice: Duties to Protect or Coerce’ in Julian Roberts and Lucia Zedner (eds), *Principled Approaches to Criminal Law and Criminal Justice: Essays in Honour of Professor Andrew Ashworth* (Oxford, OUP, 2012).

against the state,<sup>11</sup> not against all, but in other jurisdictions, such as South Africa, the position is often less clear-cut, as Babie and Krumrey-Quinn consider in the context of a discussion of the constitutional right to be free from discrimination.

This question of which approach is the appropriate ‘human rights’ approach becomes even more contested when we include the vexed issue of the role that positive obligations play in current understandings of human rights. As we shall see, for example in the contribution by Babie and Krumrey-Quinn, the distinction is sometimes made between negative rights (such as the typical civil liberty of freedom of expression) and positive rights (such as the typical socio-economic right to basic health care), although Cameron regards the distinction as ‘misleading’ and too crude to capture the legal practice. This is a particularly pressing issue in the socio-economic rights context, where the distinction often features, with positive rights often being adopted because of concerns to ensure greater access to distributive justice. Yet, as King shows, the United States Supreme Court opted for an interpretation of the US Bill of Rights that for the most part famously comprises negative but not positive rights.

Fourthly, are ‘human rights’ greater than simply the sum of its parts, or are ‘human rights’ just a ragbag collection of separate unconnected rights? Is ‘human rights’ a banner signifying a common moral urgency based on some shared normative principle, or just a flag of convenience? And, to bring the issue back to the narrower concerns of this book, is the adjudication of each right in issue essentially *sui generis* in terms of the approach taken? Can we accurately speak about ‘the’ approach to human rights adjudication? There is an important emerging human rights scholarship that seeks to find the underlying unity of human rights adjudication in the widespread use of proportionality. Möller and Yowell, among others, argue that the jurisdictions discussed appear to share a strong common approach in subjecting *prima facie* breaches of human rights to a proportionality analysis. On the other hand, we have clear examples where the courts do not subject some important rights to proportionality, such as the right to be free from torture. Carolyn Evans notes how legislatures and courts may adopt a ‘portfolio’ approach, adopting different strategies in different contexts, even where these different approaches seem inconsistent with each other. She argues that legal systems will probably continue to shift somewhat uneasily between approaches. And Pillay’s analysis of the Indian case law discloses, as Wesson says, a ‘radical inconsistency’ not only in terms of the differing approaches taken to different rights, but how these approach differ over time concerning the same right.

Fifthly, are human rights to be understood in universal or context-specific terms? The strong ideology of human rights is that they are universal in their significance; they are not rooted in any particular region of the globe, but appeal across cultures. Yet, at the same time, as O’Cinneide argues, and as is clearly on display in the subsequent chapters, different jurisdictions have very different ‘boundary conditions’ that limit the extent to which rights can be legally enforced in any given jurisdiction. (He shows how these boundary conditions will structure how social rights are adjudicated, interpreted and enforced, but his argument is of significance across the range of rights). Different contributors give examples of how differing boundary conditions contribute to divergence in rights interpretation and enforcement, such as the different institutional contexts in

<sup>11</sup> The question of whether they are rights against State governments as well as against the federal government was for long a contentious question.



which litigation emerges giving rise to different types of litigation. We have already observed that Pillay describes how important the institutional context of Indian litigation is, with the role of public interest or social action litigation being dependent on organised non-governmental organisations. O’Cinneide himself identifies differences in textual and doctrinal starting points (‘text matters’), differences in the sources of judicial authority, and differences in the nature of the constitutional culture as important factors, the latter being well illustrated by the contrasting approaches taken to human rights adjudication in jurisdictions with transformative and conservative Bills of Rights, as Wesson discusses. King and Cameron identify how different courts construct their approach to social rights adjudication (and in particular how interventionist to be) in part based on the responsiveness of the other branches of government.

Perhaps the most important ‘boundary condition’ relates to the differing historical conditions of different jurisdictions. All of the courts discussed are engaged in a delicate balance of relying on and, at the same time, constructing a political identity in their jurisdictions through their interpretation of human rights standards. But whilst *constructing* these identities, each court requires a degree of *already existing* common constitutional identity from which to build, in order to provide the basis for its most difficult decisions. This tension between identifying what is an already existing identity and the creation of a new identity for different times has been something that courts have confronted over the course of their history. As we read the chapters in this book, we see how frequently differences in history between different countries help to explain why there are differences in human rights policy, or why institutions behave differently on some human rights issues. One obvious example is the United States, where the history of constitutional judicial review between the 1900s and the 1930s, beginning with *Lochner* (1905),<sup>12</sup> and ending with the Court’s acceptance of the New Deal’s radical expansion of the interstate commerce clause,<sup>13</sup> has continuing significance, as Yowell discusses (in [chapter five](#)).

But we are left with a dilemma. While we need to have an understanding of history to appreciate what is going on, to what extent is history considered to be a *justification* for the approach adopted? The answer to that question throws us back to the issue of universalism versus cultural relativism. If courts accept the former, then history has a much less certain role as a justification, as opposed to simply being an explanation. (The much more restrictive approach adopted in Germany to the expression of racial hatred in public is explained in large part by reaction against Germany’s history of anti-semitism, but does that history justify these greater restrictions?) But if courts accept the latter, then history may be both an explanation and a kind of justification. The use of the meta-principle of human dignity may provide an example of this. Cameron identifies the close relationship between socio-economic rights and the concept of human dignity (an apparently highly universalistic concept) but at the same time explains how dignity is a flexible, context-specific concept: ‘what is required to live in dignity differs widely in different contexts’.

Finally, what are the circumstances in which a human right can be successfully overridden? Are human rights in general properly to be considered to be rules with a deontic character (as in Dworkin’s original ‘rights as trumps’ analysis<sup>14</sup>), or should human rights be thought of, in a particularly influential alternative way of thinking about them, as

<sup>12</sup> *Lochner v New York*, 198 US 45 (1905) (United States).

<sup>13</sup> Culminating in *Wickard v Filburn*, 317 US 111 (1942) (United States).

<sup>14</sup> Ronald Dworkin, *Taking Rights Seriously* (Cambridge MA, Harvard University Press, 1978)

‘optimization requirements’ (Alexy’s analysis of constitutional rights<sup>15</sup>). Here too, the contributors identify radically diverging approaches being adopted by courts. The issue comes to the fore particularly in those contexts where conflicts arise between one right and another right, for example between the right to freedom of religion and the right to freedom from discrimination, or where there is a conflict between the right to life and the right to due process. Where there is an apparent conflict of rights, should we accept some hierarchy of rights, with some rights being more important than others? Some have suggested, for example, that some rights are intrinsically valuable – that is they are valuable as ends in themselves – while others are merely instrumentally valuable – that is they are valuable as a means to an end – and that intrinsically valuable rights have greater weight than instrumentally valuable rights. But there are considerable problems that arise in the application of this approach. In the context of the right to a fair trial, or freedom of expression, is this intrinsically valuable, or merely instrumentally valuable, or both? More importantly, is it correct to argue that something being intrinsically valuable means that it should rank above instrumentally valuable goods? We shall see that different courts reach different conclusions.

## **B. Why is Human Rights Adjudication Problematic?**

We can say, therefore, that courts diverge significantly in their substantive understanding of human rights in ways that result in significantly diverging outcomes in human rights litigation. Before we attempt to tackle the other respects in which the courts significantly diverge, in particular in their approach to interpretation, we need to understand the concerns that have contributed significantly to pressures to develop a distinctively legal methodology of rights adjudication.<sup>16</sup>

A distinctive feature of many human rights norms is that they are couched at a very high level of abstraction, and that they engage deeply moral or ethical questions; this is not true universally with regard to all that are considered to involve human rights claims, but these features are sufficiently widespread that human rights practice in general is often considered to be characterised by these features. Given these features, what do institutions do when they try to work out what these abstract moral or ethical propositions mean when they need to be applied in particular circumstances of claimed violation? In particular, how do *courts* react when faced with this task? And the answer, at an equally high level of abstraction, is the same for all courts. They are required to develop a certain practice of justification for the extensively *interpretative* function that they are undertaking when they adjudicate human rights claims. The courts are much less able, or likely, to rely on justification from *authority* that is more central to other areas of judicial adjudication.<sup>17</sup> In developing an appropriate justification of their interpretative function, courts need to be aware that there are two main criticisms that have been made of judicial adjudication of human rights issues, other than simply criticism of the substantive differences at which human rights courts arrive. As Cameron suggests, the issues of *judicial competence* and *judicial legitimacy* predominate in discussion. Each has several dimensions.

<sup>15</sup> Robert Alexy, *A Theory of Constitutional Rights* (trans) Julian Rivers (Oxford, OUP, 2002).

<sup>16</sup> von Bernstorff, [chapter four](#) of this volume.

<sup>17</sup> Cp Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford, OUP, 2009).



Those concerned with *judicial competence* in the human rights area question whether human rights issues have particular dimensions that mean that judges are ill equipped to handle them, and (usually) that other institutions of government are better equipped. So, for example, we could question how well equipped the courts are in deciding questions of fact in national security cases: are judges prevented by the training that they receive, or because of the institutional context in which they operate, from making accurate findings of fact that there is, or is not, an existential threat to a particular country from terrorism? Krebs (in [chapter nine](#)) questions whether, under current institutional limitations, the judges are competent to do so. Her argument is organisational and not personal; it is not that the judges are not professional enough, but rather that the processes, the institutional limitations, and the dynamics that develop around national security cases, prevent them from being able to conduct effective review of secret evidence in counter-terrorism cases. A similar issue arises in the context of adjudicating socio-economic rights issues, which have often been thought to involve ‘polycentric’ issues unsuited to judicial methods.<sup>18</sup> By contrast, those concerned with *judicial legitimacy* in human rights litigation include concerns that, irrespective of whether judicial institutions are *competent* to handle such issues, it is illegitimate for other reasons that they should do so, such as for democratic reasons, or reasons based on the separation of powers. The issue of the relationship between the courts and the democratic process is one that refuses to go away, particularly so when the rights in issue are seen as explicitly anti-majoritarian. Why should judges rather than elected politicians get to decide these issues?

For reasons of institutional survival, if for no other reason, the courts themselves have a compelling interest in heading off any significant crisis of faith in human rights adjudication, based either on competence or legitimacy. The courts are themselves deeply interested in negotiating both the issue of judicial incompetence and that of judicial illegitimacy. All the courts share a central problem of how to secure and retain legitimacy when interpreting often highly indeterminate texts. The only way, ultimately, to secure this legitimacy is by persuading their audiences that what they are doing is exercising *legal* judgement, as Justice Breyer argues in *van Orden*.<sup>19</sup> The ultimate authority of all these courts lies in the power of the written word and the wisdom of their decisions. Each court has wrestled with how best to justify to its audiences how it is exercising *legal* judgement in the contentious areas of human rights, and each has developed a range of techniques for doing so, but the problem of legitimacy remains. One approach that the courts have developed, seeking to address the issue of judicial legitimacy, is the adoption of interpretative principles that attempt to distance their ultimate decision from being seen as simply political or simply moral. The other approach, seeking to address the issue of judicial competence, is that the courts have adapted the institutional characteristics of the courts themselves. We turn now to consider both these approaches.

### C. Judicial Distancing Strategies: Diverging Interpretative Moves

We can identify several techniques that courts adopt in attempting to construct a workable and convincing approach to human rights adjudication that is distinctively legal

<sup>18</sup> As Wesson, [chapter fourteen](#) of this volume, suggests.

<sup>19</sup> *Van Orden v Perry*, 545 US 677, 698 (2005) (Breyer J, concurring) (United States).

and does not fall into the traps just described. Courts attempt to distinguish what they are doing in adjudicating human rights claims from simply acting as political or moral actors by using ‘distancing devices’.<sup>20</sup> Each, though in different ways, responds to the need to give reasons that the judges will hope to be discerned as genuinely legal reasons, relying on legal sources to base justifications for decision-making, not (just) political or moral arguments, and adopting criteria for legitimate judicial human rights methodology that seek to provide, as von Bernstorff suggests they must, a degree of coherence and predictability.

*(i) Textual and Originalist Interpretations:*

Different methodologies have been proposed for trying to answer the question of what human rights involve as a legal issue. One approach to the question is descriptive. One variant of the descriptive approach attempts to answer the question by developing a simple narrative about how the term has come to be used, and how its usage has developed and changed. Another type of descriptive approach is that of categorical designation, which lawyers often adopt. We say that human rights are those rights designated as such by law, whether domestic law, or international law. So, to the question, ‘what are human rights?’, one response is to say: look at the Universal Declaration of Human Rights, or look at the International Covenant on Civil and Political Rights, or look at the German Basic Law.

This ‘descriptive’ approach has given rise to two different methods of interpretation. One is the *textual method* in which the court regards the actual words of the written text as determining the application of the text to the problem before the court. This approach is often combined with an approach that emphasises the meaning of the words as intended by the legislator. Usually this *historical method* is concerned less with the dictionary meaning and more with broader understanding of what the textual provision was intended to achieve as revealed by an analysis of the legislative history or the *travaux préparatoires*. In the case of a constitution, this could involve the understanding of the ratifying convention or of the drafters.

Textual and historical approaches are considered by some judges in human rights courts to be important bedrocks to justify their conclusions, because they are the closest that courts can come to the classic authority-based justifications for judicial reasoning. Courts rely on originalist approaches, and on the historical authority of the founding fathers, to justify the preferred conclusion, or courts rely on the plain meaning of the text to determine the issue. Babie and Krumrey-Quinn point to the importance attached to the inclusion of sexual orientation as one of the grounds of non-discrimination in the South African Constitution as an important source of justification for the expansive approach taken by the Constitutional Court in gay rights.<sup>21</sup> Different texts give rise to different legal results. Sometimes texts really matter and the court considers that it simply has no alternative other than to follow the plain words. We should not ignore, therefore, the extent to which differences in results between courts in different jurisdictions arise directly from different textual provisions being present. Despite there being significant overlapping consensus between human rights texts, particularly those enacted after

<sup>20</sup> J Raz, ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in L Alexander (ed), *Constitutionalism: Philosophical Foundations* (Cambridge, CUP, 1998).

<sup>21</sup> See also van der Vyver, [chapter twelve](#) of this volume.

1945, significant areas of divergence persist. Some relevant constitutional texts, particularly modern ones, address the issue, with the consequence that the court will have reduced capacity and responsibility to develop its own approach. Thus, the extent to which primary legislation is reviewable may well be determined in the text.

The emphasis that some courts, in some contexts, give to text is important, not least because it calls into question the extent to which human rights interpretation can legitimately be understood as involving only a 'balancing' or proportionality analysis. The latter approach downplays the idea of rights as texts instantiating legal rules in certain circumstances. It may underestimate the effect of rights as textually or historically based if the courts are seen as simply balancing everything (whereas some rights are not balanced, for example, torture under the ECHR), and also overemphasises the role of rights as textually determined, by finding *prima facie* rights everywhere (whereas there are limits *ratione materiae* and *ratione personae* to rights in all legal instruments).

We can point to other particular features of human rights texts in those jurisdictions being compared to illustrate the areas in which such divergence arises. Jurisdictions vary in the extent to which the Bills of Rights provisions are attempting to deal with specific historical problems of that country. The German Basic Law is particularly rich in examples of this phenomenon, with extensive provisions dealing with states of emergency, and militant democracy that clearly reflect that country's experience during Weimar. Jurisdictions also vary in the extent to which the rights guaranteed apply only to citizens of the country. In Germany, again, several provisions of the Basic Law only apply to protect German citizens; in Canada educational language rights and freedom of movement only apply to Canadian citizens; in South Africa, political rights apply only to citizens. Jurisdictions also vary in the extent to which they protect property rights, with the strong property rights protections in the Irish Constitution in marked contrast to the very limited property rights protections in the Indian Constitution, and the absence of any in the Canadian Charter of Rights. Jurisdictions also differ extensively in the extent to which they explicitly recognise socio-economic rights, with South Africa clearly a relative outlier in this respect, as far as the jurisdictions considered in this book are concerned, with its extensive and detailed provisions. So too, the jurisdictions differ in the extent to which they protect minorities as groups, with the Indian and Hungarian Constitutions taking a strong group-based approach that is in marked contrast with the individual rights protections apparent elsewhere.

The human rights texts differ too in the ways and the mechanisms they provide for implementation and enforcement. Canada, New Zealand, and the United Kingdom provide examples where the 'counter-majoritarian' difficulty is recognised, but in significantly different ways, with Canada granting the federal and provincial legislatures an override power, New Zealand preventing the courts from reviewing legislation at all, and the United Kingdom adopting the half-way house of permitting the courts to make declarations that legislation is incompatible with the Human Rights Act 1998, which have no legal effect between the parties. These apparently technical differences mask significant theoretical differences in what relationships they contemplate between the courts and the democratic institutions of the state.

We should not, therefore, ignore the importance of text or of historical understandings for the courts. Yet for courts to adopt either of these approaches to the exclusion of others is also problematic. For the courts simply to rely on the descriptive approach, relying simply upon history or text seems naïve. Texts are so open ended, and drafted at

such a level of generality, that the really hard questions of interpretation are not at all clearly addressed, and we must (either explicitly or implicitly) adopt a theoretical approach to the meaning of human rights in order to interpret them. Not surprisingly, then, there are important examples where text and history seem much less evident and much less important. There is a strikingly useful example that Pillay provides of constitutional borrowing by India of the Irish constitutional mechanism of directive principles, in which the close similarity of the drafting of the two sets of provisions has not resulted in a similar approach being adopted by the Irish and Indian Supreme Courts. Instead, we find the opposite, apparently showing the relative unimportance of text and history in this particular context.

*(ii) Normative Reasoning*

The alternative to the adoption of a ‘descriptive’ approach is that of an explicitly ‘normative’ approach to the idea of human rights. In the seventeenth and eighteenth centuries, advocates of rights derived them from God, or from what was ‘natural’. In our own day, there has been no shortage of explanations of the normative underpinnings of human rights. Some have argued that they derive from the concept of equal concern and respect, some from notions of distributive justice, some from ideas of what is necessary to satisfy basic social needs. And the idea that the definition and interpretation of human rights involves a normative element is one to which some of the judges we will be encountering in this book are strongly attached. This contributes to the significant ideological differences between the courts in their understanding of human rights in general and their understanding of specific rights in particular. As we have seen, ideological differences between the courts are clear. Judicial review, perhaps particularly in the context of human rights cases, often involves highly contested issues of morality, ethics and values, and courts are mostly highly conscious of the need to develop methods of dealing with it.

Yet, for the courts to adopt a straightforwardly normative approach is problematic. In particular, there is a persistent concern that adjudicating human rights issues involves judges relying on their own subjective/political weighting of interests to a greater degree than they would in other areas of legal decision-making. These concerns are often expressed as giving rise to conflicts with the ‘rule of law’, in so far as judicial adjudication fails to erect stable and predictable standards of human rights protection,<sup>22</sup> and with the principle of the ‘separation of powers’, in so far as it leads to an allocation of responsibilities to courts that are properly the domain of other branches of government because they should properly be made by way of democratic decision-making.<sup>23</sup> One type of normative reasoning in particular is heavily criticised: that type of reasoning which involves judges ‘balancing’ different interests and deciding where the balance of advantage lies, taking everything into account. Where courts are engaged in ‘balancing’ of rights, or rights and other interests, the question of the legitimacy of judicial decision-making is often raised – isn’t balancing a ‘political’ function? In particular, von Bernstorff’s functional account of judicial decision-making strongly criticises ad hoc balancing.

<sup>22</sup> von Bernstorff, [chapter four](#) of this volume.

<sup>23</sup> Especially in national security and (Wesson, [chapter fourteen](#) of this volume) socio-economic rights areas.

*(iii) Developing Alternatives to Pure Normative Reasoning and Pure Description*

The bulk of the reasoning discussed by the contributors to this book involves neither purely descriptive, nor purely normative analysis of the type just described. Instead, what we see is the evolution of alternative approaches to justifying judicial adjudication of human rights claims. Four methods of interpretation not so far discussed may be identified: a *functional or structural method* that emphasises neither the text nor the historical meaning, but the way in which the provision to be interpreted fits within the legal (often the constitutional) system as a whole, encouraging an interpretation of a right that ensures that the system functions in a coherent, harmonious way; a *doctrinal method*, in which the decision is based partly on an analysis of judicial precedents, which are regarded as imposing an obligation (or at least a strong pressure) on the judge to follow or at least distinguish them in subsequent analogous cases; a *prudential method*, involving the judge assessing the consequences of each possible interpretation, including such considerations as convenience, efficiency, and political support; and a *teleological method*, which identifies the end or purpose that the provision to be interpreted is intended to achieve, and interprets that provision in the way that optimises the prospects of its realisation.

The contributions that follow this Introduction show how different courts give greater or lesser weight to these different methods, resulting in four particular characteristics of judicial interpretation in human rights cases: the use of categorical reasoning; the adoption of proportionality analysis; the use of judicial borrowing from other jurisdictions; and the development of meta-principles as a method of resolving conflicts. We shall have more to say about how these differing approaches interrelate, and how none has proven uncontroversial but, for the moment, we need to identify the essential elements of each.

*(iv) Categorical or Definitional Approaches*

Möller argues that '[c]ontemporary rights jurisprudence' splits the analysis of a human right, which has alleged to have been breached and is the subject of litigation, into two stages: first, whether the contested measure interferes with the right, and second, if it does, whether the justification offered for the interference is 'proportionate'. Möller argues that the first stage 'has become less and less important in practice'. Others disagree, in particular Babie and Krumrey-Quinn, who stress that 'categorical' approaches to rights interpretation, in which primary emphasis is given to the first stage are of prime importance in some jurisdictions, with respect to some particular rights. This dispute involves two distinct questions. First, is the second stage proportionality analysis the dominant judicial approach to human rights adjudication across jurisdictions? Secondly, even if it is, are some rights generally excluded from this approach; does proportionality apply across the board to all human rights or only some?

We shall return to consider the second issue in a moment; it is the former issue, however, that generates the most debate between the contributors, with the United States' approach to rights adjudication being identified by several contributors as a central case in which categorical reasoning predominates, rather than proportionality analysis. The classic example is in the jurisprudence of the United States Supreme Court interpreting the First Amendment, in which adjudication frequently focuses on the definition of the right, rather than any justification for infringing it. Babie and Krumrey-Quinn argue

that the United States has adopted a categorical approach on the issue of the rights of religious institutions to exercise internal powers without interference. King also contrasts a United States categorical approach to rights, involving fewer tradeoffs, with a balancing approach to rights, requiring more frequent tradeoffs with other interests. He suggests that the American rights culture has a greater reluctance to engage in balancing and that the more dominant American view is of 'rights as trumps', with the effect that the circle of protected rights is more narrowly drawn, but the protection accorded to those rights within the circle may be greater.

Adopting a categorical approach, under which proportionality is not predominant, means that the courts may appear less flexible. But courts that generally adopt a more 'categorical approach' have sometimes developed other practices to cope with these types of situation, where they think it may not be appropriate for the Court to intervene for the moment, but where they may not want to wash their hands of the relevant issue in the future. The legal scholar Alexander Bickel termed the use of such techniques by the United States Supreme Court 'the passive virtues'.<sup>24</sup> He emphasised how the Supreme Court 'wields a threefold power'. It may strike down legislation as inconsistent with principle. It may, by contrast, legitimate legislation as principled. '*Or it may do neither . . . and therein lies the secret of its ability to maintain itself in the tension between principle and expediency*'.<sup>25</sup> A court has many ways of 'not doing'. It may deny that it has jurisdiction to hear a case, or argue that the plaintiff lacks standing to bring it; it may dismiss a case for lack of ripeness or refuse to hear it on the ground that it raises a 'political question' best decided by the legislature; or, it may decide a case on a narrower basis than that proposed by the parties and carefully avoid key constitutional issues. Hickman and Tomkins show clearly how the absence of a proportionality-type approach in the United States courts on national security issues, and the adoption of a categorical approach, led to the courts deciding that no judicial intervention was justified, in contrast to the approach initially adopted in the United Kingdom courts. For other contributors, however, the sharp dichotomising of some jurisdictions as adopting a categorical approach whilst others adopt a proportionality approach is much too crude, as a general proposition.

#### *(v) Proportionality*

The perceived attraction of the proportionality test, as Möller points out, is to avoid the accusation that balancing is merely the exercise of a straight-forward political judgment by the courts, whilst also giving the courts sufficient flexibility to take all relevant considerations into account. The concept of proportionality plays a dual role in the contributions that follow. On the one hand, it provides the topic of one of the sections; on the other hand, it is also discussed extensively in the other sections discussing the three substantive areas of religion, security, and socio-economic rights. There are four particular issues that it is useful to identify in this Introduction regarding proportionality.

<sup>24</sup> Alexander M Bickel, 'The Supreme Court, 1960 Term-Foreword: The Passive Virtues' (1961) 75 *Harvard Law Review* 40; and Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis IN, Bobbs-Merrill, 1962).

<sup>25</sup> *ibid.*, 69.



The first relates to the prevalence of the concept in practice. Like Möller, Yowell shows that proportionality analysis is increasingly understood as lying at the core of judicial approaches in the new global constitutionalism. Here, the key issue is whether the same or a closely related concept is being used in those jurisdictions in which the term ‘proportionality’ is not normally used, in particular the United States. There is an important internal debate among the contributors about how central balancing and proportionality actually is in United States constitutional rights interpretation, with Yowell arguing that it is extensively adopted, whilst King argues that the absence of textual language explicitly permitting balancing has led to reluctance to engage in balancing in a range of socio-economic rights cases at the state and federal levels.

The second is the opposite of the first. Here, the issue is whether, in those contexts in which the term ‘proportionality’ is used, the similarity of the term camouflages significant differences in the use of the concept in different jurisdictions. In other words, even where the same term is used, is the same conception of proportionality in play? David Bilchitz identifies how there has been a tendency to converge on the use of proportionality analysis, but he argues that there are several different proportionality tests depending on the jurisdiction identified, and even within jurisdictions. A key difference is often what intensity of judicial scrutiny is involved. Again, there is a degree of variation in the contributors’ assessments of how far differences in the conceptualisations of proportionality are in fact significant.

The third issue arises from Möller’s view that the *prima facie* right in the European context does not do much work in the context of proportionality analysis. Although this argument appears to be uncontested by other contributors to the proportionality section, some evidence arising from the substantive rights sections appears to call that assessment into question. Even if Möller’s analysis generally captures the emerging dominant European approach to rights adjudication, at the domestic level in several countries and under the ECHR, there remain several rights where the interpretation of particular rights bucks that general trend, most notably under Article 3 ECHR (prohibition on torture, etc), in which the first stage dominates, and the second stage is non-existent, and in the context of Article 9 ECHR (freedom of religion), in which the first stage remains critical even where proportionality analysis is important also.

Evans identifies four approaches courts have taken to negotiate the tensions between religious freedom and rights not to be discriminated against, only one of which involves balancing/proportionality approaches. In addition, the first stage may actually be doing more work even when proportionality operates, where the later balancing stage is intensely affected by the importance attached to the *prima facie* right. Here, the question of distinguishing the ‘core’ or ‘essence’ of the right from less central understandings, with more judicial scrutiny on the first, plays a significant role. Ryan Goss, for example, describes (in [chapter six](#)) how critically important the technique of distinguishing core and periphery aspects of the *prima facie* right has become in the national security area in Canada, a jurisdiction in which the proportionality approach is also much in evidence.

The fourth issue is whether Möller is correct in his argument that, with the predominance of proportionality, categorical reasoning drops out of the reckoning. As Bilchitz points out, adopting a strategy of deference to the legislature or other institutions of government, either in general or with regard to specific areas, is frequently in evidence in jurisdictions adopting a proportionality approach. But there remains a significant problem of determining when to apply deference. Various examples of ‘deference’ by the

courts are evident in the contributions in this book, not least in the chapters dealing with judicial review of national security issues. The doctrine of the ‘margin of appreciation’ by the European Court of Human Rights is a classic example, and perhaps the most obvious. But there are other less dramatic methods on display. Some courts have adopted standards of review, less interventionist as regards review of legislation, that appear to involve the re-importation of categorical reasoning into proportionality analysis. When the Court of Human Rights decides that it accord a wide margin of appreciation to states in areas of sexual morality, it reintegrates categorical reasoning into proportionality.

*(vi) Persuasive Precedent and Comparative Law Reasoning*

The doctrine of precedent in the human rights context plays a controversial role. On the one hand, relying on precedent is a classic method of attempting to secure support for a judicial decision, with the judge showing how previous judges have decided a similar issue is the way that the judge now proposes. To rely on precedent is not only to follow the principle that like cases should be decided alike, but in doing so also to seek to defuse criticism that the decision is simply an expression of the judge’s own preferences; the judge is just following what his or her predecessors have done. On the other hand, human rights has an important disruptive role, sometimes seeking to challenge orthodox ways of viewing established relations, and judges must be conscious of the need to adapt the law to ensure that it conforms to human rights standards; it is noteworthy that precedent is more often thought in human rights cases than in other areas of law to be persuasive rather than binding, even in those jurisdictions in which the common law doctrine of precedent is generally followed.

Legal precedents usually come from courts in the same legal system as the judge relying on them, but the contributions to this book identify a variant on this approach. In the discussions of the case law, there are also examples where the courts in one jurisdiction have examined and cited the approaches adopted in a *different* jurisdiction, with a view to considering how the foreign approach might help in deciding the case before it, and in helping to justify it, demonstrating how the court’s decision is driven by law rather than by politics, as Evans suggests. Johan Van der Vyver identifies (in [chapter twelve](#)) how the South African courts use American jurisprudence in religion cases. Goss identifies the influential use of comparative experience by the European Court of Human Rights in the *Chahal* case, based on experience in Canada, leading to the adoption of the special advocate scheme in national security cases in several other jurisdictions. Cole and Vladeck show how comparative analysis was used by the Supreme Court of Canada to arrive at a conclusion as to what was required under the Canadian Charter in the context of national security cases by helping the court make an empirical judgment as to the consequences in practice of various interpretative options. In these cases, the courts appear to consider that a comparative approach is particularly compatible with a view that human rights are of universal (or at least transnational) significance, and that this will be an appropriate distancing device.

We also know, however, that this practice of judicial borrowing across borders is far from being a settled practice and, indeed, remains highly controversial in particular jurisdictions, notably the United States, where the acrimonious debate between the justices on the appropriateness of the practice in adjudicating rights is well-known, and



where those opposed to the use of such comparisons often view these rights as culturally relative and contextually contingent. But the United States is far from unique in its skepticism about the use of such borrowing. In their contribution, Babie and Krumrey-Quinn point out that Australian courts are not drawing on United States jurisprudence on religious freedom issues, despite the Australian constitutional provisions being modeled to some extent on these provisions, because of the apparent textual differences between the provisions as well as the countries' differing historical contexts, a neat example of how different distancing techniques may clash. More importantly, however, the use of techniques of judicial borrowing does not escape the dichotomies we have discussed; rather they are imbedded within this technique. As Lazarus observes: '[t]he comparativist must walk a tightrope between respect for local variation and the assertion of generalisable truths'.<sup>26</sup>

*(vii) Role of Meta-Principles*

Just as the issue of proportionality can be seen as arising throughout the book, so too, the role of meta-principles crops up continually. Several meta-principles are particularly prevalent in rights interpretation: autonomy, liberty, equality, and democracy are each identified by one or more contributor as influencing on interpretation of specific textual provisions, so that in some cases, the conflicts and tensions between specific rights often appears to be translated into a conflict between meta-principles. Perhaps the most (currently) controversial of these meta-principles is the principle of 'human dignity', which arises in the context of discussions of proportionality (von Bernstorff), and the right to open justice, but is particularly discussed in the context of socio-economic rights. O'Conneide identifies the use of dignity in socio economic rights adjudication in the German context. Pillay's contribution points to the importance of dignity in the context of socio-economic adjudication in the Indian context. Cameron identifies the use of human dignity as an important consideration in the social rights jurisprudence of the South African Constitutional Court. King shows how a recent United States Supreme Court case used the concept of dignity as a basis for justifying requirements to provide adequate medical care for prisoners. However, if the courts using the concept of human dignity thought that they were adopting a device that would lessen the controversy surrounding their human rights decisions, the opposite appears to have been the case, and the use of human dignity has generated yet further controversy.

*(viii) Adapting the Institutional Capacity of Courts in Divergent Ways*

Finally, we can identify how some courts are in the process of developing new approaches to adjudicating rights issues, what O'Conneide describes as the changing 'technology' of judicial review. These changes appear to be driven, at least in part, by judges' concern to address issues of judicial competence. Thus, as King argues, drawing on American scholarly literature originating in the 1970s, courts have developed a 'public law' litigation model comprising several features: facilitating greater amounts of empirical information being made available to the court (Paul Yowell notes the strong connection between proportionality-type review and use of empirical evidence), permitting judges to become

<sup>26</sup> Lazarus, *Contrasting Prisoners' Rights* (above n 4) 10.

more centrally involved in constructing and managing human rights adjudication (Goss describes in the national security context how the courts sometimes take on the role of manager of the process of litigation, by becoming involved in deciding how much and what evidence will be made available), breaking out of the perceived strait-jacket of the adversarial process (Pillay discusses in the Indian context of socio-economic litigation how courts have adapted their procedures to deal with human rights claims, for example by more relaxing rules of standing; Krebs shows the extent to which human rights adjudication in the national security context requires the courts to adapt the judicial process to accommodate their role by functioning in an inquisitorial mode); increasing judicial flexibility through new structural injunctions and other new forms of remedial orders (Cameron identifies procedural developments in the SA context such as the: crafting of new remedies; for example, the requirement of ‘meaningful engagement’ of the parties as a remedy), and constructing more ‘dialogic’ models of judicial review, where courts enter into a continuing relationship with other institutional actors in order to address the problem (Krebs shows how Israeli courts developed new procedural techniques in order to accommodate new functions, including playing the role of mediator between the parties).

#### **D. Looming Legitimation Crisis?**

The very creativity of the courts in addressing the challenges of legitimacy and competence has clearly not worked, if by ‘working’ we mean that it has satisfied public opinion that human rights judging is legitimate and competently handled. Indeed, the interpretative flexibility of the courts, and their openness to procedural changes have probably increased suspicion that the courts are making it up as they go along.

If taken to an extreme, attempts to construct an approach to judicial decision-making in the human rights context to distance the courts from being seen to be political are bound to fail; courts are only relatively autonomous from the political sphere in the first place. Evans points to the shifting positions of courts in human rights cases concerning religion, in which they react to social changes, especially the increased religious diversity of particular communities. Pillay shows how the Indian Supreme Court in the socio-economic rights context is moving towards a more market-driven economic growth model and away from direct government-initiated redistribution. Her explanation turns partly upon changes in the political climate; this illustrates again how courts are only quasi-autonomous agents.

Nor have the institutional changes introduced by courts necessarily provided a successful mechanism for effective decision-making. Pillay distinguishes between interpretation and implementation, and argues that the one should not be confused with the other; appropriate implementation requires deep appreciation of the social context based on empirical information. King argues for the value of empirical legal studies in this area in order to develop a better understanding of the dynamics of rights litigation. Cole and Vladeck, and Krebs, use interviews to generate empirical information about how different methods adopted by the courts to reconcile national security with due process works in practice. King considers the impact of litigation on the delivery in practice of socio-economic rights. Each of these authors points to significant gaps between the doctrinal position of the courts, and the delivery of their decisions in practice, thus

bringing back into contention the competence of the judges in these areas, even when the courts have adapted their processes in the ways discussed above.

As a result, some of the contributors go so far as to identify elements of a possible credibility crisis in human rights adjudication.<sup>27</sup> Babie and Krumrey-Quinn identify examples of political backlash against activist human rights courts in the state of Victoria, Australia. King points to a backlash in the United States arising from the negative consequences of litigation in socio-economic rights area. O'Conneide identifies a political backlash against the Constitutional Court in Hungary reacting against perceived judicial activism on human rights. Hickman and Tomkins give a detailed account of backlash against judicial activism in a human rights context, one that did not primarily involve the jurisdiction directly concerned (UK) but another affected jurisdiction (the US).

### III. CONCLUSION

Within any particular legal system, human rights law or judicial reasoning in human rights cases possess those characteristics that we consider such phenomena to possess 'just in virtue of its being legal', as Joseph Raz put it.<sup>28</sup> Human rights law *across the different jurisdictions*, being *law*, also shares the features of what is considered to be common to legal provisions, such as the use of concepts such as rights and duties, obligations, rules, and principles.<sup>29</sup> To that minimum extent, therefore, there is a clear universal quality to human rights adjudication, examined comparatively, because we are dealing with *law*, not necessarily because we are dealing with *human rights law*.

The courts considered in this book do, however, also share a common dilemma: how to convince their audience that their adjudication is *legal*. But the methods the courts have adopted to address the central problems of competence and legitimacy seem to play off against each other. The combination of issues of judicial competence and judicial legitimacy appear to amount to a classic double bind, in which contradictory demands are made, and those seeking to justify continued judicial involvement in human rights issues are pointed in potentially conflicting directions. On the one hand, the more the courts behave as distinctively legal institutions, the more they look like *courts*, not adapting their processes and procedures, the more likely they are to be considered incapable of dealing with human rights competently because they are out of touch, pre-occupied with technical distinctions and engaging in overly refined argumentation. On the other hand, the more the courts change their procedures and institutional practices to become 'competent' in this sense (the more they begin to look like a cross between a parliamentary committee and a Cabinet committee, and the less they look like 'courts' in the traditional sense), the more the public may wonder why they have any greater legitimacy to make highly contested human rights decisions than any of the other branches of government whose processes they now ape (and whether, compared with legislatures, they have a great deal less since they are generally not elected).

<sup>27</sup> von Bernstorff, [chapter four](#) of this volume.

<sup>28</sup> J Raz, 'On the Nature of Law' (1996) 82 *Archives for Philosophy of Law and Social Philosophy* 1, quoted by Lazarus, *Contrasting Prisoners' Rights* (n 4 above), 10.

<sup>29</sup> Lazarus, *Contrasting Prisoners' Rights* (n 4 above), 10.

Apart from sharing the minimum features that go to make human rights law *law*, and facing similar pressures to account for their decisions, we have seen that the way in which apparently similar concepts are instantiated in any particular legal system may vary extensively. As Lazarus has argued, legal concepts (including the legal idea of human rights) ‘can have both universal and parochial qualities’.<sup>30</sup> Human rights law appears to lack an uncontested structure, content, method or consistent theoretical underpinning across jurisdictions. This legal pluralism appears to be the result of claims involving competing and, sometimes, incompatible substantive values, each supported by credible human rights sources and interpretations. Human rights, as interpreted by the courts, function in apparently contradictory ways: they look forward but also backward; they appeal to both communitarian and individualistic values; they juggle both the particular and the universal; they struggle between continuity and change; they empower the state, and they challenge its power. Courts seem to be constantly caught in these opposing forces. Thus far, the courts, considered comparatively, have failed to provide much more than a set of opposite and conflicting propositions, useful in providing a language in which to articulate each decision, but not amounting to a principled and coherent system.

<sup>30</sup> Lazarus, *Contrasting Prisoners’ Rights* (n 4 above) 10.



## Part 2

# Proportionality



## *Constructing the Proportionality Test: An Emerging Global Conversation*

KAI MÖLLER

IN RECENT YEARS, there has been a growing acknowledgment of the importance of the principle of proportionality for rights adjudication around the world. A brief inspection of the structure of human and constitutional rights shows why the principle has acquired its central position. Contemporary rights jurisprudence splits into two stages the analysis of whether a policy, executive decision or court judgment violates rights. At the first stage, the question of whether the measure interferes with a right is addressed. The second stage examines the justification for the interference, and this justification succeeds if the measure interfering with the right is proportionate. The first stage has become less and less important in practice, largely as a consequence of rights inflation, ie the phenomenon that more and more interests are protected as rights.<sup>1</sup> Thus, almost every policy which imposes a burden on a person will also interfere with one of his or her rights. It is therefore no surprise that proportionality, as the core doctrinal tool employed at the second stage, has taken on such a prominent role in rights adjudication. As Grégoire Webber puts it: '[T]he entire constitutional rights-project could be simplified by replacing the catalogue of rights with a single proposition: The legislature shall comply with the principle of proportionality'.<sup>2</sup>

The growing awareness of the practical importance of the principle of proportionality has sparked a wave of academic scholarship. We can broadly identify two existing lines of scholarship; this Part of the volume aims to establish a third more firmly. The first integrates the doctrine of proportionality into a broader theoretical framework. The father of this tradition is Robert Alexy, with his famous theory of rights as principles and optimisation requirements.<sup>3</sup> For Alexy, all norms are either rules or principles. Constitutional rights, it turns out, are principles, which means that they must be realised to the greatest extent factually and legally possible. For Alexy, the principle of proportionality follows logically from the nature of constitutional rights as principles. In spite

<sup>1</sup> On rights inflation, see K Möller, *The Global Model of Constitutional Rights* (Oxford, Oxford University Press, 2012) ch 1.

<sup>2</sup> G Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge, Cambridge University Press, 2009) 4.

<sup>3</sup> R Alexy, *A Theory of Constitutional Rights* (Oxford, Oxford University Press, 2002).



of the arguable weaknesses of his theory,<sup>4</sup> Alexy deserves merit for being the first scholar to devise a comprehensive theory of rights which is centred on the proportionality principle. A few years ago, Matthias Kumm presented his theory of rights adjudication as Socratic contestation,<sup>5</sup> and this theory, too, has the proportionality principle at its centre: proportionality is the doctrinal tool which allows judges to assess the reasonableness, or plausibility, of a policy and thus to determine whether it survives Socratic contestation. I have recently added to the debate by proposing an autonomy-based theory of what I call ‘the global model of constitutional rights’, at the core of which lies the obligation of the state to take the autonomy interests of every person adequately into account. One consequence of the broad understanding of autonomy which I propose is that there will often be conflicts of autonomy interests, which have to be resolved in line with each agent’s status as an equal. The proportionality principle is the doctrinal tool which guides judges through the process of resolving those conflicts.<sup>6</sup>

The second line of scholarship is critical of proportionality. It identifies a number of perceived weaknesses of the principle and proposes abandoning it. Dworkinians defend conceptions of rights which regard them as trumps, which seems incompatible with proportionality and its central feature, namely balancing.<sup>7</sup> Others, in a more negative spirit, identify perceived weaknesses of proportionality without offering an alternative theory of rights;<sup>8</sup> they claim, for example, that balancing at the final stage of the proportionality test is impossible because of incommensurability, or criticise the impressionistic and unprincipled nature that balancing often takes in legal practice. However, for the project of rejecting proportionality to have any chance of success, a critic must first make sure that he or she attacks the best, and not some distorted, understanding of proportionality. It is easy to take some misconception of what proportionality is about and then point out its flaws; but it is much harder (and more worthwhile) to do this only after having first identified the best possible conception of the principle.<sup>9</sup>

This leads straight to the third line of scholarship, the one that a large part of this Part of the volume is dedicated to, in particular the contributions by David Bilchitz and Jochen von Bernstorff (chapters three and four respectively), but also, to an extent, Paul

<sup>4</sup> See K. Möller, ‘Balancing and the structure of constitutional rights’ (2007) 5 *International Journal of Constitutional Law* 453, where I criticise the formal nature of Alexy’s approach and recommend a substantive moral one.

<sup>5</sup> M. Kumm, ‘The Idea of Socratic Contestation and the Right to Justification: The Point and Purpose of Rights-Based Proportionality Review’ (2010) 4 *Law & Ethics of Human Rights* 141; M. Kumm, ‘Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review’ (2007) 1 *European Journal of Legal Studies*.

<sup>6</sup> K. Möller, *The Global Model of Constitutional Rights* (Oxford, Oxford University Press, 2012).

<sup>7</sup> Dworkin first proposed the idea of rights as trumps and defended it in slightly different forms throughout his life; see for example *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton, NJ, Princeton University Press, 2006). See also Tsakyrakis’s criticisms of proportionality: S. Tsakyrakis, ‘Proportionality: An assault on human rights?’ (2009) 7 *International Journal of Constitutional Law* 468; M. Khosla, ‘Proportionality: An assault on human rights?: A reply’ (2010) 8 *International Journal of Constitutional Law* 298; S. Tsakyrakis, ‘Proportionality: An assault on human rights?: A rejoinder to Madhav Khosla’ (2010) 8 *International Journal of Constitutional Law* 307. For a Dworkinian perspective on human and constitutional rights law, especially under the ECHR, cf. G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford, Oxford University Press, 2007). For an argument that Dworkin’s theory of rights as trumps accommodates balancing, see P. Yowell, ‘A Critical Examination of Dworkin’s Theory of Rights’ (2007) 52 *American Journal of Jurisprudence* 93, 96–97.

<sup>8</sup> G. Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge, Cambridge University Press, 2009).

<sup>9</sup> K. Möller, ‘Proportionality: Challenging the Critics’ (2012) 10 *International Journal of Constitutional Law* 709.

Yowell's (chapter five). It is, unlike the second line of scholarship described above, not negative in spirit but positive: its basic assumption is that proportionality is a valuable doctrine, and it wants to show proportionality in its best light, rather than destroy its appeal. Unlike the first line, this approach is not *primarily* interested in the broader theoretical framework of which proportionality is a part but focuses on the way it operates or ought to operate in practice, in the actual resolution of cases. It concentrates on the proportionality *test* and aims at identifying a version of the test which best captures the normative commitments entailed by a proper understanding of the point and purpose of the principle of proportionality. The question of which specific conception of the test is preferable is largely unexplored and only rarely even identified as a problem; it is therefore unresolved and there exists a considerable diversity in the approaches of the courts. The acknowledgment of this diversity could be regarded as an invitation to investigate the question of why different courts have adopted different versions of the test. Traditionally, comparative scholarship has often engaged in the comparative analysis of the history and application of certain concepts and doctrines in different jurisdictions. While this is a methodologically valid enterprise, the contributions to this Part take a different, though no less comparative, approach: they regard the various courts and judgments as contributing to a global conversation about rights adjudication and its most important structural feature, the proportionality test. Thus, their interest is not in the history of ideas but in *morality*: in order to take rights seriously, how should we construct the proportionality test, and what can we learn from the different conceptions on offer?

Before looking at the problems which arise at the different stages of the test, it will be useful to give a brief overview of the proportionality test, and as a starting point I will take the version which is used by the German Federal Constitutional Court and most theorists of proportionality.<sup>10</sup> According to this test, a measure restricting a right must, first, serve a legitimate goal (legitimate goal stage); it must, secondly, be a suitable means of furthering this goal (suitability or rational connection stage); thirdly, there must not be any less restrictive but equally effective alternative (necessity stage); and fourthly, the measure must not have a disproportionate impact on the right-holder (balancing stage). Scholars writing on proportionality, including the scholars contributing to this Part, are inconsistent as to whether the first stage of the test (legitimate goal) is a part of the test or a preliminary step. Accordingly, some scholars speak of a three-stage, others of a four-stage test; and what some refer to as, for example, the 'second' stage of the test is called the 'third' stage by others. It is important to keep this in mind to avoid confusion.

There exists a number of problematic issues with regard to this (or other forms of) proportionality inquiry. One, widely neglected, question is about the legitimate goal stage: what does it mean to speak of the goal of a policy, and what does it mean to require a goal to be legitimate?<sup>11</sup> With regard to the suitability and necessity stages, some of the open issues are how to deal with empirical uncertainty: should this lead to wide-ranging

<sup>10</sup> cf R. Alexy, *A Theory of Constitutional Rights* (Oxford, Oxford University Press, 2002) 66; M. Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in Pavlakos (ed.), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford, Hart Publishing, 2007) 131, 157.

<sup>11</sup> On this issue, see M. Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in Pavlakos (ed.), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford, Hart Publishing, 2007) 131; Möller, *The Global Model of Constitutional Rights* (Oxford, Oxford University Press, 2012) ch 7.

deference to the elected branches?<sup>12</sup> At the balancing stage, we have to ask the question of what it means to say that a right is ‘balanced’ against a competing right or public interest.<sup>13</sup> All those questions, interesting and important as they are, are not the topic of this Part of the book. Rather, the contributors deal with a set of different issues arising at the necessity and balancing stages. Von Bernstorff and Bilchitz take as their starting point the German test as presented above, identify certain weaknesses or problems with the necessity and balancing stages, and propose ways to address and fix those problems. Yowell examines the test, concludes that a combined test of necessity and balancing lies at the core of the proportionality inquiry, and identifies the existence and endorsement of this core in US constitutional rights jurisprudence. This leads him to conclude that US law, too, embraces a form of proportionality analysis – indeed, that it may have been embracing proportionality long before much of the rest of the world.

We must look more closely at the German test and its Canadian counterpart to set the scene for a closer engagement with their chapters. One remarkable feature of the German test is that it tends to push most of the important issues into the last stage, the balancing stage. At the legitimate goal stage, *any* goal that is legitimate will be accepted. At the suitability stage, even a *marginal* contribution to the achievement of the goal will suffice. At the necessity stage, it is very rare for a policy to fail because less restrictive alternatives normally come with *some disadvantage* and cannot therefore be considered equally effective. Thus, the balancing stage dominates the legal analysis and is usually determinative of the outcome.

Contrast the German test with the Canadian version of proportionality. According to the *Oakes* test, the objective must be ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom’; there must be a rational connection between measure and objective; the means must ‘impair “as little as possible” the right or freedom in question’; and finally, ‘there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of “sufficient importance”’.<sup>14</sup>

Under this test, arguably more issues are addressed at the earlier stages. Instead of accepting *any* legitimate goal, *Oakes* requires a goal ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom’. And the minimal impairment test is different from the German necessity test both in the way in which it is formulated (there is no requirement that the less restrictive measure be equally effective) and in the way it is applied in practice: the Canadian Supreme Court tends to resolve cases at that stage and not, as the German Federal Constitutional Court, at the balancing stage.

In an important article published a few years ago, Dieter Grimm – a former judge of the German Federal Constitutional Court – contrasted and compared the German and Canadian approaches, defending the German one.<sup>15</sup> He argues that the point and purpose of the second and third stages (suitability and necessity) is ‘confined to a strict means–ends examination’.<sup>16</sup> As such, they differ from the analysis at the final stage,

<sup>12</sup> As a proposal of how to deal with uncertainty, see Alexy’s ‘Second Law of Balancing’, which he proposes in the Postscript to *A Theory of Constitutional Rights* (Oxford, Oxford University Press, 2002).

<sup>13</sup> I develop a theory of balancing in chapter 6 of *The Global Model of Constitutional Rights* (Oxford, Oxford University Press, 2012).

<sup>14</sup> *R v Oakes* [1986] 1 SCR 103, paras 69, 70 (Canada).

<sup>15</sup> D Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57 *University of Toronto Law Journal* 383.

<sup>16</sup> *ibid*, 393.

which involves a comparison of the loss for the fundamental right with the gain for the good protected by the law. In particular, Grimm objects to the practice of the Canadian Supreme Court which tends to read what in his view should be carried out at the balancing stage into the legitimate goal stage and the necessity stage (in Canadian terminology, the minimal impairment stage).

For him, the perceived attraction of such a view may be the desire to avoid, as far as possible, balancing because of its perceived nature as 'political' rather than 'legal'. This, however, would be a fallacy: balancing is unavoidable, and all that the Canadian approach does is to shift what properly belongs to the final stage of the test into the earlier ones. One of Grimm's examples, picked up by both Bilchitz and von Bernstorff in their contributions to this volume, is based on a scenario similar to the facts in the US case of *Tennessee v Garner*.<sup>17</sup> Would a law be proportionate which allows the police to shoot a perpetrator to death if this is the only means of protecting private property? A properly conducted proportionality inquiry reveals that in order to satisfactorily resolve the case there is no way to avoid balancing: the legitimate goal is the protection of property; and shooting the perpetrator to death is suitable and, in light of the fact that no alternatives are available which achieve the goal of protecting property, also necessary. It is only the comparison between the relative importance of life and property in the specific circumstances of the case which allows the conclusion that the shooting would be disproportionate. Thus, balancing is required, and given that it is required, it is preferable to conduct it openly at the balancing stage, rather than in a hidden way at the necessity (or minimal impairment) stage.

Grimm's article thus defends and shows the appeal of the German test. However, there are indeed problems with this version of the proportionality test, which are identified and for which solutions are proposed by Bilchitz and von Bernstorff. The proper application of the German test leads to a practice of constitutional review with two connected problems: first, as pointed out above, usually almost all the moral work is done at the balancing stage, arguably rendering the earlier stages largely useless and throwing doubt on the truth of the popular argument that proportionality is a valuable doctrine partly because it structures the analysis of rights issues in a meaningful way. Secondly, the balancing act at the final stage is often carried out in an impressionistic fashion which seems to be largely unguided by principle and thus opens the door for subjective, arbitrary and unpredictable judgments encroaching on what ought to be the proper domain of the democratic legislature. The first concern is addressed by Bilchitz, the second by von Bernstorff; both propose remedies for the weaknesses they identify.

Bilchitz focuses on the necessity stage of the test. He takes issue with both the German test – according to which almost all policies are necessary because any alternative policy will usually have some disadvantage which means that it cannot be considered equally effective – and the Canadian minimal impairment test – which, taken seriously, narrows down the range of constitutionally acceptable policies far too much: 'minimal impairment' can be read as insisting that only one measure could pass constitutional scrutiny, namely the measure which impairs the right least.<sup>18</sup> So the alternatives seem to be either to construct the necessity (minimal impairment) test as filtering out almost nothing or to

<sup>17</sup> *Tennessee v Garner*, 471 US 1 (1985) (United States).

<sup>18</sup> On the various problems which the Canadian Supreme Court created for itself because of its early unfortunate statements on proportionality see S Choudhry, 'So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter's* Section 1' (2006) 34 *Supreme Court Law Review* 501.

allow only one policy, thus rendering the elected branches partly superfluous. In order to preserve a meaningful but not unduly strict role for the necessity stage, Bilchitz proposes the following inquiry. First, a range of possible alternatives to the measure employed by the government must be identified. Secondly, the effectiveness of these measures must be determined individually; the test here is not whether each respective measure realises the governmental objective to the same extent, but rather whether it realises it in a ‘real and substantial manner’. Thirdly, the impact of the respective measures on the right at stake must be determined. Finally, an overall judgment must be made as to whether in light of the findings of the previous steps, there exists an alternative which is preferable; and this judgment will go beyond the strict means–ends assessment favoured by Grimm and the German version of the proportionality test; it will also require a form of balancing to be carried out at the necessity stage.

As an illustration, Bilchitz considers the *Beit Sourik* case of the Israeli Supreme Court, which concerned the erection of a separation barrier between Israelis and Palestinians in order to increase security for Israeli citizens who had faced terror attacks coming from the Palestinian territories.<sup>19</sup> One of the issues the Court considered was the existence of alternative routes which would have led to a significantly less severe impact on the lives of Palestinians; thus, the question was whether in light of the existence of alternative routes, the route chosen by the government was necessary. The Court declared the existing route necessary on the grounds that any alternative route, while having a lesser impact on the lives of Palestinians, would not provide the same degree of security to Israelis. It thus applied the traditional test and required that for a measure to be unnecessary, the alternative had to be equally effective (as well as less restrictive). The Court then, in the final balancing analysis declared the fence disproportionate because the additional security benefit that was achieved relative to one of the alternatives was outweighed by the additional harm imposed on Palestinians who, as a consequence, were separated from their lands.

Grimm would no doubt approve of this way of analysing the issue. The comparison of benefits and burdens of a given policy is precisely what, for him, belongs to the balancing stage; and pushing it into the necessity stage would obscure the fact that balancing is precisely what is going on. Bilchitz disagrees. For him, the preferable place to resolve this case would have been the necessity stage. The different possible routes which the fence could have taken should have been considered, their effectiveness in achieving a sufficient degree of security for Israelis assessed, as well as their impact on the lives of Palestinians, and an overall qualitative judgment should have been made, leading to the conclusion that in light of the less restrictive alternative which led to a little less security for Israelis but significantly less harm for Palestinians, this alternative should have been chosen and the existing route was unnecessarily restrictive. This would not have rendered the final balancing stage meaningless: if it turned out that the measure was indeed necessary in that no feasible alternative existed, the question to be examined at that stage would be whether the chosen measure was disproportionate; and the possibility exists that even a measure for which no alternative exists that sufficiently protects the governmental objective might be disproportionate. Take the example, discussed above, concerning the shooting to death of a perpetrator in order to protect property. There exists no alternative to shooting the perpetrator which realises the objective of protect-

<sup>19</sup> HCJ 2056/04, *Beit Sourik Village Council v The Government of Israel* (2004) (Israel).

ing property; thus, the measure is necessary even under Bilchitz's account, yet arguably this use of force is disproportionate because the perpetrator's interest in life outweighs the property owner's interest in her property.

Thus, Bilchitz manages to propose an interpretation of the necessity stage which makes it meaningful while reserving an equally important place for the balancing stage. The question to be resolved at the necessity stage is: could the original decision-maker legitimately conclude that the measure chosen was indeed the best response to the social problem at hand? If the answer to this question is affirmative, then the question to be answered at the balancing stage is whether the chosen measure, in spite of being necessary, imposes a disproportionate burden on the right-holder. It would seem that if it does, the social problem should be tolerated because it cannot be addressed in a way that is both effective and proportionate. The value of this conception of the necessity and balancing tests goes beyond achieving conceptual clarity: it is based on the insight that the traditional proportionality test is oversimplistic in that it cannot adequately deal with the social reality that there is normally a range of possible answers to a social problem, and it designs the test in a way that enables it to deal with this issue properly.

Von Bernstorff, too, takes as his target the traditional proportionality test as it has evolved in judicial practice, but both his diagnosis and his proposed solution differ from Bilchitz's. He takes issue with what he aptly labels 'ad hoc balancing', namely the practice of resolving conflicts between a right and a competing right or interest by weighing the interests involved *on a case-by-case basis* at the final stage of the proportionality test. Von Bernstorff identifies several problems with ad hoc balancing. Most importantly, a practice of judicial review which includes ad hoc balancing leads to a considerable degree of legal uncertainty because it is often impossible to predict the outcome of the ad hoc balancing process in a given case. This implies that every act of the legislature is potentially up for grabs in the balancing exercise, which is problematic from the perspective of collective self-government. Related, because of the absence of certainty and predictability, is that the practice of judicial review that endorses ad hoc balancing may be comparatively more vulnerable to political pressure than one which does not.

However, this diagnosis does not lead him to a rejection of judicial review or an unqualified rejection of the balancing stage within the proportionality framework. Rather, his proposal is to replace ad hoc balancing with a practice which relies to a greater extent on categorical forms of reasoning, in particular what he calls 'bright-line rules', inspired by various forms of categorical judicial reasoning identified in both the jurisprudence of the German Federal Constitutional Court and the US Supreme Court, which are often overlooked in the literature on proportionality. His proposal for the proper handling of the scenario in *Tennessee v Garner* is not to engage in ad hoc balancing between the right to life of the fleeing suspect and the right to property, but to create a rule which, while the product of weighing, establishes a limit to the use of force which is applicable to similar cases. In *Tennessee v Garner*, this rule could be that the killing is prohibited unless it is the only available means of safeguarding innocent life that is under an immediate threat by the acts of the felon. The disadvantage of this rule is that it is less flexible than ad hoc balancing but its advantage is that it increases predictability and provides public authorities guidance as to what limitations of rights are acceptable.

In this scenario the creation of the rule requires some balancing. However, in other scenarios von Bernstorff proposes to do away with balancing altogether, or at best, to



limit the kinds of considerations entering into the balance. In *Boujlifa v France*,<sup>20</sup> the European Court of Human Rights had to decide whether it was permissible to deport so-called ‘second generation migrants’, who had lived in Europe for almost their entire lives, back to their country of origin after completion of their prison terms. The Court proceeded, unsurprisingly, by balancing the applicants’ rights under Article 8 ECHR against the relevant public interests, looking at the specific facts of each case and including a broad variety of considerations. It is precisely this ad hoc balancing and its lack of stability and predictability to which von Bernstorff objects. His proposal is that the Court should have focused primarily on the intensity of the interference, thus creating a stable rule which would have allowed the handling of similar cases in the future. For example, the rule could have been that the deportation of a second generation migrant who has spent most of his or her life in the Member State and has close family ties in that state is prohibited, independently of the severity of his or her crime. Similarly, in the South African case of *State v Williams*,<sup>21</sup> which deals with the permissibility of juvenile whipping, von Bernstorff objects to the language of balancing used by the judges, and proposes a bright-line rule straightforwardly prohibiting juvenile whipping independently of any public interests at stake (eg the severity of the crime). Thus, he advocates a way of judicial reasoning with rights which draws limits to the state’s power by respecting what is sometimes called the ‘core’ or ‘essence’ of the right at stake. Conversely, in a case where this judicially constructed core is not affected, he recommends that the courts ought to defer to the legislature at the balancing stage, and his example is the Canadian case of *Alberta v Hutterian Brethren*,<sup>22</sup> which dealt with the Province of Alberta’s requirement that driver’s licences bore photographs of the licence holder, to which some people objected on religious grounds. Since, for von Bernstorff, this limitation was not severe because it did not affect the core or essence of the right at stake, courts should have restricted their proportionality assessment to an examination of the legitimate aim, suitability and necessity of the law, deferring to the legislature at the balancing stage as long as the core of the right was not affected.

It is important to see that von Bernstorff’s project is not to abolish all kinds of balancing from rights adjudication. The judicial creation of a stable bright-line rule will often (though not always) require some kind of balancing. However, the balancing is limited because the rule can be applied without balancing to similar cases in the future, thus fostering a judicial culture which balances the values of predictability and respect for collective self-government in a more attractive way than is currently done in systems which endorse ad hoc balancing.

Yowell’s contribution takes a different perspective and explores the extent to which constitutional rights adjudication in the United States resembles the European (or global) proportionality-based approach to judicial review (although, as we shall see, it also adds an interesting perspective on the discussions about the proper construction of the proportionality test). The US tradition of rights adjudication is not only the oldest and in some ways most impressive, it also stands out in that the United States is the only jurisdiction, or at least the only jurisdiction that is widely studied, which does not use proportionality analysis – at least not explicitly. Rather, US constitutional law relies on a

<sup>20</sup> *Boujlifa v France* (2000) 30 EHRR 419 (ECtHR).

<sup>21</sup> *The State v Williams et al*, 1995 (3) SA 632 (South Africa).

<sup>22</sup> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (Canada).

system of tiered scrutiny: limitations of fundamental rights normally attract strict scrutiny, which means that the governmental measure must advance a compelling state interest and must be narrowly tailored; whereas the limitation of interests not deemed to be fundamental is reviewed under a 'rational basis' standard, which requires that the measure be rationally related to a legitimate state aim. For certain groups of cases the standard of intermediate scrutiny is applied. Yowell's argument is not only that US jurisprudence can well be constructed as involving some kind of proportionality analysis, albeit under a different terminology; additionally he makes the striking claim that US constitutional law, and in particular the *Lochner* decision of 1905,<sup>23</sup> is actually the father of proportionality analysis.

To reach this conclusion, Yowell provides original interpretations not only of American rights adjudication but also of its global counterpart, which he labels the 'European' proportionality inquiry in order to highlight its historical origins; and these interpretations bring the two more closely together than they might initially seem. The European proportionality inquiry is characterised by the already-mentioned two-stage analysis, with a distinction between the first stage where the question of interference is assessed and a second stage which assesses the justification, using the four-stage proportionality test. Yowell observes that in practice, the first two stages of the test (legitimate goal and suitability) tend to get little or even no attention, and that the third and fourth stages (necessity and balancing) are often not strictly separated but run together in one overall inquiry. Thus, he concludes that the core feature of the European conception of rights is this necessity/balancing inquiry. This part of Yowell's chapter thus supports Bilchitz's view that a strict separation of the necessity analysis and balancing is neither possible nor desirable (although the two authors disagree about whether necessity and balancing, properly understood, are two distinct tests or just one). Yowell's concern, however, is not so much the proper structure of the test but more its relation to methods of US constitutional law. Turning to that issue, he argues that implicit in the tiered-scrutiny approach of US constitutional law is a commitment to balancing – that is, a commitment to what he sees as the central feature of the European proportionality inquiry. The commitment to balancing is overlaid only by the tiered-scrutiny framework, which in many ways resembles the European approaches which often also use variable intensities of review. Having identified the commitment to balancing as the true defining feature of the proportionality analysis, and having identified the existence of this feature in American constitutional jurisprudence, Yowell goes on to claim, strikingly, that the United States, and not Europe, is where proportionality was invented, and he locates the decisive moment for this development in the famous case of *Lochner v United States*.

*Lochner* has a bad name in many human rights circles because it marks a period at the beginning of the twentieth century where the US Supreme Court, in the name of freedom of contract, frequently struck down social and economic regulations intended to protect workers. In the case, the Court declared unconstitutional a provision in New York's Bakeshop Act that prohibited employees of bakeries from working more than 10 hours per day or 60 hours per week. But Yowell discovers another side to it, and his reading of the case as setting the standard of a highly fact-specific proportionality inquiry somewhat conflicts with the dominant interpretation of *Lochner* as an example of judges

<sup>23</sup> *Lochner v New York*, 198 US 45, 59 (1905) (United States).



pushing an ideological agenda. He shows how the Supreme Court's reasoning resembles, structurally, the inquiry regularly performed by courts applying the proportionality test today: the Court distinguishes between illegitimate (protecting workers because of their limited bargaining power) and legitimate aims (protecting health), and it demands a proper relationship between means and ends, including a balancing requirement. As is typical for proportionality-based judicial review, the assessment is fact-specific and deals, for example, with statistical evidence regarding mortality rates of members of different professions in order to show the lack of necessity of the measures set up by the Bakeshop Act. Thus, for Yowell, *Lochner* 'deserves to be known as the first major proportionality case in constitutional law, and the case that set the paradigm for modern rights-based judicial review of legislation'.<sup>24</sup>

This brief overview of some of the main themes of the contributions to this Part cannot do justice to the depth and breadth of the respective chapters. I hope that it does show, however, the importance and value of what I referred to as the emerging 'third line' of proportionality scholarship, which adds to the theoretical scholarship on proportionality, and that of critics of the principle, by focusing more closely on the proper structure of the test. Bilchitz and von Bernstorff propose ways to improve the formulations of the test currently in use, and Yowell reminds us that even tests and doctrines that come under different labels might, upon closer inspection, turn out to be versions of proportionality. Hopefully, the contributions in this Part of the book establish this important line of scholarship more firmly and invite others to contribute to the ongoing conversation about the value and proper construction of the proportionality test.

<sup>24</sup> P Yowell, this volume, ch 5, p 113.

## *Necessity and Proportionality: Towards A Balanced Approach?*

DAVID BILCHITZ

### I. INTRODUCTION

DOMESTIC COURTS AND international tribunals often adjudicate on government measures that limit fundamental rights. The circumstances under which such a limitation may be justified are generally laid out in very broad terms in limitation clauses which differ in a variety of ways.<sup>1</sup> Despite these differences, what is notable, in recent years, is that the bodies responsible for making decisions in relation to fundamental rights have exhibited a remarkable convergence upon a general approach towards the limitation of rights that centers on the notion of proportionality.

The proportionality enquiry ultimately seeks to evaluate the benefits to be achieved by the infringing measure against the harms caused through violating fundamental rights. Judges have developed a particular reasoning process to give structure to such an analysis. The first part of this process involves considering the purpose of the measure that limits a fundamental right. Jurisdictions vary on how they characterise this stage: in Germany, for instance, the purpose must simply be a 'legitimate purpose';<sup>2</sup> in Canada, the objective must be of 'sufficient importance to warrant overriding a constitutionally protected right or freedom'.<sup>3</sup>

The second part of this process is the proportionality enquiry proper, which 'examines the relationship between the object and the means of realising it. Both the object and the means must be proper. The relationship between them is an integral part of proportionality'.<sup>4</sup> There are three key components to the proportionality test in this regard. The first stage requires that the infringing measures be 'rationally connected to the objective'.<sup>5</sup> I shall refer to this as the 'suitability requirement' which essentially holds

<sup>1</sup> A Barak, 'Proportional Effect: The Israeli Experience' (2007) 57 *University of Toronto Law Journal* 369–70 states that 'Limitation clauses are central to the understanding of constitutional democracy and of judicial review of the constitutionality of statutes. They are an expression of the democratic values of society'. In some countries, such as Canada or South Africa, there are general limitation clauses; in others like Germany there are specific clauses authorising the violation of particular rights under particular conditions.

<sup>2</sup> See D Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383, 388.

<sup>3</sup> *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 352 (Canada).

<sup>4</sup> Barak (above n 1) at 371.

<sup>5</sup> *R v Oakes* [1986] 1 SCR 103, at [70] (Canada).

that a measure that infringes a right can be justified only if it is suitable for realising the purpose it is designed to achieve. The second stage requires that the means ‘impair “as little as possible” the right or freedom in question’.<sup>6</sup> I shall refer to this as the ‘necessity’ requirement. Finally, the third stage requires that the benefits of the infringing measure must be proportional to the violation of fundamental rights caused. This I shall term the ‘proportionality *stricto sensu* requirement’ which ultimately involves weighing up the harms caused to fundamental rights against the benefits of the infringing measure. At this stage, for instance, ‘[t]he more deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society’.<sup>7</sup>

Each stage of the proportionality enquiry is deserving of detailed analysis. This chapter will focus upon the ‘necessity’ component which has often been of great importance in the jurisprudence of courts around the world in determining whether a particular measure unacceptably violates fundamental rights. In Section II, I outline what I term the ‘strict interpretation of necessity’. This understanding has been defended seminally by Robert Alexy who provides a logical derivation for it from a theoretical view of fundamental rights as principles or ‘optimisation requirements’. This interpretation, however, gives rise to two particular problems when it has been applied by courts. The first problem relates to its being formulated in a manner that is too strong: this would reduce the chances that any limitation would pass constitutional muster. Courts have thus found various methods of circumventing the test, which then reduces the protection it offers to fundamental rights. The second problem relates to the necessity enquiry being too weak and thus having little value in the judicial review of measures that infringe fundamental rights. These problems demonstrate the need for a more detailed engagement with the various sub-components of the necessity enquiry, which I seek to accomplish in Section III of this chapter.

Four components of the necessity enquiry are distinguished and analysed: possibility, instrumentality, impact, and comparativity. Each is shown to involve both normative and qualitative judgements that prevent the enquiry from neatly being reduced to a notion such as ‘optimisation’. Moreover, when the qualitative dimensions of necessity are understood, the enquiry also can be seen to require an element of balancing within it that cannot be eliminated. This analysis provides support for the approach of courts – such as in Canada – where the necessity stage of the proportionality enquiry has assumed greater importance. I seek to show, however, that, despite necessity including an element of balancing within it, the second and third stages of the proportionality enquiry should not be collapsed. This is important for courts and academic writers who are concerned about the broad discretion and ad hoc nature of the reasoning often present at the third stage of the enquiry. This chapter allows for an alternative approach to the third stage to be developed (such as is evident in the work of Jochen von Bernstorff in [chapter four](#) of this volume), yet suggests that a more restrained form of balancing in the necessity enquiry cannot be dispensed with. I conclude by outlining a revised moderate interpretation of necessity that provides a much better conceptual framework and guided process of reasoning, which courts can employ to test the constitutionality of laws and executive actions that infringe fundamental rights.

<sup>6</sup> *ibid.*

<sup>7</sup> *ibid.*, at [71].

## II. TWO PROBLEMS WITH STRICT NECESSITY

### A. The Strict Formulation of Necessity

In examining the question of necessity, it is important to start from how it has been formulated by courts in various jurisdictions. The German Constitutional Court – which is the first court to have made extensive use of the proportionality enquiry in relation to fundamental rights – holds that a statute which limits a fundamental right ‘is necessary if the legislator could not have chosen a different means which would have been equally effective but which would have infringed on fundamental rights to a lesser extent or not at all’.<sup>8</sup> Similarly, the Canadian Constitutional Court in the celebrated case of *R v Oakes*, formulates the requirement as entailing that the means ‘should impair “as little as possible” the right or freedom in question’.<sup>9</sup> The Israeli Supreme Court has similarly stated that the means used ‘must injure the individual to the least extent possible. In the spectrum of means which can be used to achieve the objective, the least injurious means must be used’.<sup>10</sup>

These formulations share a high degree of similarity and express what I shall term the ‘strict interpretation of necessity’ (SN). Analytical justification for this formulation of the test of necessity is given in the impressive work of Robert Alexy. The principle of necessity flows logically, according to Alexy, from a particular conception of fundamental rights. For Alexy, rights are principles rather than rules. Rules are norms that are always either fulfilled or not; whereas principles are ‘norms which require that something be realized to the greatest extent possible given the legal and factual possibilities’.<sup>11</sup> This characterisation of principles has implications for how to deal with conflicts between them: it means that where they conflict, one principle has to be weighed against the other and a determination has to be made as to which has greater weight in this context.<sup>12</sup> Alexy contends that this process is governed by the principle of proportionality: indeed, ‘the nature of principles implies the principle of proportionality’.<sup>13</sup>

The strong interpretation of necessity, according to Alexy, is entailed logically by an understanding of rights as optimisation requirements.<sup>14</sup> If rights are norms that must be optimised to the greatest extent possible, then when engaged in proportionality analysis, courts should adopt a stringent approach ensuring that any limitation of a right that is being proposed should strictly speaking be *necessary* to realise the purpose sought to be achieved. This means that no other alternative must be available that can equally realise the purpose and be less invasive of the right in question.

To see why this is so, it is important to recognise that the notion of principles as optimisation requirements means that the outcome must be adopted that allows for the greatest possible realisation of each principle so far as this is compatible (both factually

<sup>8</sup> *Cannabis decision* BVerfGE 90, 145 (9 March 1994), at [172] (Germany).

<sup>9</sup> *Oakes* (above n 5), at [70].

<sup>10</sup> HJC 2056/04, *Beit Sourik Village Council v Government of Israel*, at [41] (*Beit Sourik* case) (Israel).

<sup>11</sup> R Alexy, *A Theory of Constitutional Rights* (Oxford, Oxford University Press, 2002) 47.

<sup>12</sup> *ibid.*, 50.

<sup>13</sup> *ibid.*, 66.

<sup>14</sup> *ibid.*, 67–68 and 399.

and legally) with the greatest realisation of the others.<sup>15</sup> Thus, any degree of intrusion into Principle 1 (a right) may only be allowable to the extent necessary to realise another vital competing Principle 2 (an important social objective). If another means is available that equally realises Principle 2, and has a lesser impact on Principle 1, then Principle 1 is not being optimised to the greatest extent possible compatible with the realisation of Principle 2. This strict interpretation of necessity, thus, can be seen to derive from the characterisation of rights as ‘optimisation requirements’.

Part of the problem with Alexy’s argument relates to making sense of the notion of ‘optimisation’ in this context. It is important to recognise that Alexy’s language is metaphorical. The notion of ‘optimisation’ in a field such as economics, where quantification is possible, has a clear meaning: we evidently understand what it means, for instance, to optimise profit. However, the exact meaning of this term in the legal or moral context is less perspicuous, as the principles and values to be evaluated and balanced are qualitative and not quantifiable in the same manner.<sup>16</sup> I shall, in Section III of this chapter, consider the extent to which the language of optimisation is apposite when engaging with the various sub-components of the necessity enquiry.

## B. Is Strict Necessity Too Strong?

Two significant problems flow from the strict interpretation of necessity, both of which have a significant impact on the protection it accords to fundamental rights.<sup>17</sup> The first problem relates to the fact that the strict interpretation places a considerable burden upon other branches of government to justify any measure that limits a right. Requiring there to be no other measure that equally realises the purpose and has a less restrictive impact on the right could allow for very few limitations on fundamental rights to pass constitutional muster. As Blackmun J famously wrote, ‘[a] Judge would be unimaginative indeed if he could not come up with something a little less “drastic” or a little less “restrictive” in almost any situation, and thereby enable himself to vote to strike the legislation down’.<sup>18</sup> If the strict interpretation were to be applied scrupulously, judges would be required to consider all possible alternatives that could realise the government objective and be less restrictive of the right. The identification of any alternative that was even slightly less restrictive and equally effective would be sufficient to defeat a legislative measure. As a result, if the strict interpretation were to be applied rigorously, it would be very difficult for any law – however well-motivated – to pass the proportionality enquiry with the result that courts would often be striking down legislation as unconstitutional.

This would be problematic for a variety of reasons. The first problem is that the test may prevent limitations from passing constitutional muster that are indeed normatively justified when the balance of reasons is considered. The strict interpretation means that any slightly less drastic means would be sufficient to defeat a legislative measure, how-

<sup>15</sup> K Möller, ‘Balancing and the Structure of Constitutional Rights’ (2007) 3 *International Journal of Constitutional Law* 453, 459.

<sup>16</sup> K Möller (ibid) 462.

<sup>17</sup> An analysis of the various sub-components of necessity in Section III of this chapter will also show why the language of ‘optimisation’ is not apposite in many ways.

<sup>18</sup> *Illinois State Board of Elections v Socialist Workers Party et al*, 440 US 173, 188–89 (1979) (United States).

ever well-considered it is. To illustrate this point, consider the case before the German Constitutional Court challenging the regulatory requirement that tobacco manufacturers had to put warnings on cigarette packets to protect people from the attendant health risks.<sup>19</sup> Alexy, in his discussion of the case, argues that it involves weighing what he terms the ‘minor’ infringement on the freedom of profession of tobacco manufacturers against the sizeable impact of tobacco smoke on people’s health. He thus concludes that the outcome of the balancing process here is ‘obvious’<sup>20</sup> and the government measure is justified. However, if we consider the matter from the perspective of the necessity enquiry, Alexy’s conclusion, in my view, is too quick.

Alternative measures could easily be thought of to achieve the purpose which do not require tobacco producers to place health warnings on their packets (and thus be less restrictive of the right in question). Consider, for instance, requiring manufacturers to contribute towards broader public educational measures, or a major advertising campaign which would in all likelihood be a more effective means to achieve the public health objectives set by the government and be less restrictive of the rights of manufacturers. A strict interpretation of necessity might require a court to strike down this measure on these grounds. Furthermore, it will always be difficult to determine whether the particular measure adopted by the government is constructed in the manner least restrictive of rights. In the context of the health warnings, there would always be a question as to whether the size of the warning required by the legislature was the least intrusive possible of the manufacturers’ right to place commercial information on the cigarette packet.<sup>21</sup>

Apart from the problem that limitations of rights will rarely be capable of being justified on a strict application of this standard, this example also illustrates how the strict interpretation of necessity would lead to a separation of powers problem. Courts would be required to strike down any law that did not meet this strict test and to substitute their judgement concerning which measure is ‘least restrictive’ for that of the legislature. Doubts may be raised concerning the competence of the court to do so. A legitimacy problem may also arise if the courts are seen ultimately to narrow democratic, legislative discretion too significantly.<sup>22</sup>

Three types of responses can be identified to address this problem, none of which, I shall argue, go to the root of the problem which lies in the strict interpretation of necessity itself. The first response involves essentially denying that necessity requires categorically that the legislature adopt the least intensively interfering means. Alexy writes that

[t]he point is simply that if the legislature wishes to pursue its goal further, it may only use the less intensive of the means, or an equally mild means, or a still milder one. That is no optimization to the highest point, but simply a ban on unnecessary sacrifices of constitutional rights.<sup>23</sup>

It is hard to see the force of Alexy’s argument here. Indeed, it is true that, when considering a particular limitation of a right, a court could strike it down if there are *any* alternative means that are equally effective and less restrictive of the right. This in fact reinforces

<sup>19</sup> The case is *Warnhinweise für Tabakerzeugnisse* BVerfGE 95, 173 (Germany). Alexy (n 11 above) discusses the case at 402–3.

<sup>20</sup> Alexy (n 11 above) quoting the US Court 440 US 173, 187 (1979).

<sup>21</sup> For a discussion of this example, see D Bilchitz, ‘Does Balancing Adequately Capture the Nature of Rights?’ (2010) 25 *Southern African Public Law* 423, 436.

<sup>22</sup> This is indeed a worry that several German academics have raised and is the subject of a reply by Alexy (n 11 above) 389.

<sup>23</sup> Alexy (n 11 above) 399.

the strictness of the test. Moreover, it is not true that the legislature then has the discretion to adopt any alternative means it likes. In order for a revised measure to pass constitutional muster, the alternative must be the 'least intensive' or mildest one possible: if the legislature fails to adopt such a measure, then it will fail to optimise both the objective sought to be achieved and the fundamental right in question and will be acting unconstitutionally. The strict conception of necessity does reduce the discretion of the legislature significantly and, in a system of judicial review, requires intrusive intervention on the part of the judiciary.

The second response seeks to address the problem of the strict interpretation being too strong by reducing the epistemic burden on the party seeking to justify the limitation of a right. It is argued that determining whether the legislature has adopted the least restrictive means is not a matter that admits of a certain judgement. As Choudhry points out, '[p]ublic policy is often based on approximations and extrapolations from the available evidence, inferences and comparative data, and, on occasion, even educated guesses. Absent a large-scale policy experiment, this is all the evidence that is likely to be available'.<sup>24</sup> The Canadian Supreme Court has recognised that decisions on matters relating to the limitation of rights 'must inevitably be the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society'.<sup>25</sup> If we take these points seriously, then it means that a government, when seeking to justify a measure according to the strict interpretation of necessity, will usually be unable to do so to any high degree of certainty. This opens the door to reducing the strength of the necessity standard through lessening the epistemic conditions needed to satisfy the standard.

It is quite clear that if no evidence is produced that the test of necessity is met, then the protection of rights will be weakened significantly; on the other hand, too strong a requirement seems unreasonable in the light of existing evidence.<sup>26</sup> Different possibilities have been suggested to address this problem. Some judges in the Israeli Supreme Court have sought to impose a presumption that a law of parliament is constitutional, claiming that those challenging the law have the task of proving its unconstitutionality. Goldberg J for instance writes:

[t]he party defending the law need not show that there are other alternatives that more severely infringe the right and that the less-infringing alternative was chosen, but rather the party arguing against the validity of a law must show that there exists a specific, clear alternative that fulfills the proper purpose, while infringing the protected right in a manner that is significantly less than the infringement of the law.<sup>27</sup>

Such a presumption in favour of the necessity test having been met means that a court can avoid going through this reasoning process unless convincing evidence is presented to establish that alternative means exist.

Part of the point of the necessity enquiry is to force courts to engage closely with the effect of the government's measure and possible alternatives in relation to the stated objective and the fundamental right in question. A presumption of constitutionality

<sup>24</sup> S Choudhry, 'So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1' (2006) 32 *Supreme Court Law Review* 512, 524.

<sup>25</sup> *Mckinney v University of Guelph* [1990] 3 SCR 229, 304 (Canada).

<sup>26</sup> See Alexy (n 11 above) 417–18.

<sup>27</sup> See the judgments of Cheshin, Goldberg and Bach JJ in CA 6821/ 93, *United Mizrahi Bank v Migdal Cooperative Village*, PD 49(4) 221, 421 (1994) (Israel).



would usually involve an abdication of the court's responsibility to reason through whether the requirement of necessity has been met or not, thus weakening any protection it offers to fundamental rights significantly. Moreover, such a generalised deferential presumption offers very weak protection for fundamental rights and appears to go against the very normative importance they are to have in a system with judicial review. Fundamental rights are not just any normative consideration: they are particularly strong entitlements that can only be limited on the basis of a strong justification. This requires there to be a presumption against limiting rights rather than a presumption in favour thereof.

In the face of the evidentiary problems that exist in dealing with necessity, the Canadian court has developed a test requiring a 'reasonable basis' for the judgement that a particular measure is necessary.<sup>28</sup> Alexy has sought to address this problem by developing what he terms a second law of balancing. That law states '[t]he more heavily an interference in a constitutional right weighs, the greater must be the certainty of its underlying premises'.<sup>29</sup>

All these approaches recognise that complete epistemic certainty is not possible in judging whether the necessity test has been met or not. However, it is of vital importance to distinguish between the various tests involved in determining proportionality and the evidentiary basis necessary to make a judgement that these tests are satisfied. It is this distinction which points to a more generalised difficulty with an approach that addresses too strict a test of necessity through reducing the evidence required to meet the test. To ostensibly retain the strict interpretation of necessity yet effectively weaken it through fiddling with the epistemic conditions for its realisation is to reduce the clarity or guidance as to what is required to justify the limitation of a fundamental right. We thus need to develop a test that is sufficiently protective of rights and can be met by prevailing epistemic conditions rather than utilising an unrealistic test and then undermining it through reducing the evidence necessary to establish that it has been satisfied. Otherwise, it is unclear in fact what the evidence we have must be directed at proving and we are left with judgments that will be ad hoc and arbitrary. If the requirements of the test are to be understood differently, then this should be addressed directly. Fiddling with the evidence in order to reduce the requirements of the test will cause significant confusion and thus significantly reduce any possible protection afforded to fundamental rights by the necessity test.

The third and final response to addressing the problem that the strict interpretation of necessity renders the test too strong is to focus on *who* should determine whether the test is met or not. Courts have often adopted a strategy of 'deference' to the legislature concerning what constitutes the 'least restrictive means'. The German Constitutional Court, for instance, in its judgment on the constitutionality of criminalising the possession of and dealing in cannabis, immediately qualifies the requirement of necessity as follows:

[i]n forming a judgment as to whether the chosen means is suitable and necessary for achieving the desired goals the legislator has a certain degree of discretion. The same applies to the estimation and prediction of the dangers which threaten other individuals or the public good

<sup>28</sup> *Irwin Toy v Quebec (Attorney General)* [1989] 1 SCR 927, 994 (Canada).

<sup>29</sup> Alexy (n 11 above) 418. I cannot within the scope of this chapter evaluate these responses to the problem of epistemic uncertainty.



which must be undertaken in this context. The Federal Constitutional Court can only review the exercise of this discretion to a limited extent, the precise extent depending on the nature of the subject in question, the feasibility of forming a sufficiently clear view, and the nature of the legal interests which are at stake.<sup>30</sup>

Where the strict interpretation of necessity thus appears to lead to an unreasonable outcome or to constrain the legislature too much, the court can claim that it must defer to the other branches of government in judging whether the standard has in fact been met. The German Constitutional Court is not alone in its expressions of the need for deference in relation to the necessity enquiry. The Canadian courts,<sup>31</sup> Israeli courts<sup>32</sup> and South African courts<sup>33</sup> have all expressed similar sentiments in some of their jurisprudence.

However, the approach – of adopting a strict interpretation of the requirement and then being highly deferential to the other branches as to whether it has been met – suffers from several flaws. First, it seems to attack the effect rather than the cause: the separation of powers problem appears to arise from an unduly strict interpretation of the necessity requirement. The court attempts to remedy the problem by deferring to the legislature rather than addressing the standard itself. Secondly, by shifting the focus in this way, the court in fact may abdicate its proper responsibility in a society that accepts judicial review, to determine whether a violation of a right is justifiable or not. That enquiry requires a determination whether such a measure is proportionate, which in turn requires that the court be satisfied that the principle of necessity is met. For a court to defer to other branches of government in this regard, is for it to avoid actually determining whether a particular violation of a right meets the requirements of this test or not. Either a limitation of a right must be necessary or not; it makes no sense to defer the judgement concerning whether this requirement has been met to the very body whose measure in this regard is being impugned. The deference strategy thus allows us to pretend that a measure is in fact necessary given that Parliament has deemed it to be so, when it is not in fact so.

Finally, there is, ironically, a significant danger that the supposedly strict protection offered by necessity for fundamental rights will be significantly weakened by a deferential approach. When, for instance, should courts look deeply into the question of necessity and when should they defer? Without a clear principled basis for deference in some cases rather than others, the necessity enquiry could be effectively avoided in cases where it is most important. For instance, in a case such as the cannabis judgment – where courts face protecting rights in the face of a high degree of controversy – how can we be assured that deference will not be accorded too readily? In other cases, the legislature may claim that too little deference is shown. Without clear criteria for determining when precisely this should occur, deference seems to lead to an undue subjectivism on the part of courts, and thus renders the protection of rights through a stringent test such as necessity precarious.

Unfortunately, the factors outlined by the German Constitutional Court concerning when deference should be accorded do not appear to be helpful. The nature of the subject suggests that some subjects require less deference than others: without more specification, it is unclear why this is so and to which subjects a more deferential strategy should apply.

<sup>30</sup> *Cannabis decision* (n 8 above) 173.

<sup>31</sup> *Her Majesty the Queen in Right of the Province of Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, at [53] (*Hutterian Brethren*) (Canada).

<sup>32</sup> HCJ 2056/04, *Beit Sourik Village Council v Government of Israel* (n 10 above) [40]–[48] and [58].

<sup>33</sup> *S v Manamela* 2000 (3) SA 1 (CC), at [95] (South Africa).

A similar point applies to the nature of the legal interests at stake. The criterion relating to the ‘feasibility of forming a sufficiently clear view’ is also extremely vague and once again raises important questions concerning the evidentiary basis upon which necessity is determined.<sup>34</sup> According to Choudhry, the Canadian court too has struggled to articulate an adequate basis for according deference in some cases and not doing so in others. It has also not been consistent in when it accords deference.<sup>35</sup> The consistency of courts and ability to provide clear criteria as to when to defer is thus to be doubted; without doing so, the necessity test loses much of its value.

Having a strict standard with a high level of deference thus grants rights little protection. Indeed, the strictness of the standard can be seen to be part of the problem in that it motivates courts to reduce what they expect of the legislature and thus impacts upon the effectiveness of the standard. A better approach, it seems, would be to have a more adequate understanding of the standard, which places realistic requirements on the parties before the court and for institutional capacity to play a role only insofar as this renders a party better placed to make a judgement on a particular issue. In Part III, I shall elaborate upon what such a realistic approach to necessity entails.

### C. Is Strict Necessity Too Weak?

The strict interpretation of necessity may also lead to the converse problem that the actual test itself is construed in a manner that renders it too weak. This worry arises from the element of the test which requires that any alternative measure considered should be equally effective in realising the purpose sought to be achieved by the other branches of the government. The question arises as to what is meant by ‘equal effectiveness’?

Aharon Barak is a proponent of a strict approach and writes that

[t]he first element of the necessity test examines the question of whether alternative means can fulfill the law’s purpose *at the same level of intensity and efficiency* as the means determined by the limiting law. If such an alternative does not exist, the law is necessary and the necessity test is met (emphasis added).<sup>36</sup>

He goes further and holds that ‘the necessity test is based on the assumption that the only change that should be brought about by the alternative means is that the limitation on the constitutional right would be of a lesser extent’.<sup>37</sup> Thus, any increase in any cost associated with an alternative measure would lead it to fail to meet the requirement that it be equally effective in realising the purpose. Barak claims that a consideration of alternatives which are not equally effective in this way should take place at the final balancing stage of the proportionality enquiry. The strict approach is exemplified by the judgment of the Israeli Supreme Court in the *Beit Sourik Village Council v Government of Israel*.<sup>38</sup>

<sup>34</sup> See the discussion of the second response above: see S Choudhry (n 24 above) 512–21.

<sup>35</sup> See S Choudhry (n 24 above), who outlines how the Canadian court attempted to delineate categories of deference and the lack of consistency with which this was applied.

<sup>36</sup> A Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge, Cambridge University Press, 2012) 323.

<sup>37</sup> *ibid.*, 325.

<sup>38</sup> HCJ 2056/04.

This extremely strict interpretation of the requirement that the measure realise the purpose in an equally effective manner strongly reduces the importance of the necessity test.<sup>39</sup> Barak recognises that this interpretation creates significant weakness in the test and, perhaps for this reason, he no longer views it as being at the ‘heart’ of the proportionality enquiry.<sup>40</sup> The balancing stage of proportionality thus becomes ‘the most important of proportionality’s tests’.<sup>41</sup> Indeed, this interpretation can render the necessity enquiry virtually useless: if equal effectiveness is interpreted strictly, it may be difficult to show that any alternative measure could ever realise the purpose ‘equally’. Great importance will also be placed on the level of abstraction and manner in which the purpose is construed, which will in turn determine how the level of effectiveness is to be judged.<sup>42</sup>

Barak’s interpretation of equal effectiveness unsurprisingly also seems to be at odds with how courts have employed the test. Take, for instance, the case in Germany relating to a regulation that prohibited the selling of confectionery that was not a genuine chocolate product but rather consisted mainly in puffed rice with cocoa powder. The aim of the regulation was to protect consumers from mistaken purchases. Yet, the Federal Constitutional Court found that the trade prohibition was not necessary: labelling could interfere with the rights of manufacturers less whilst ‘equally effectively’ protecting individuals against deception and confusion.<sup>43</sup> Yet, if we adopt the strict interpretation of equal effectiveness advocated by Barak, it appears that the Court was unjustified in reaching its conclusion. A ban on such products will no doubt be more effective than a labelling requirement and entirely prevent confusion: labelling can be more or less effective and must take into account social scientific facts such as that consumers often do not read labels and some consumers are more literate than others. The court thus inevitably had to weaken its understanding of the degree to which the purpose was realised in order to reach its conclusion that the government measure was not necessary.

Alexy, in his analysis of this case, appears to approve of the Court’s reasoning, thus rejecting Barak’s strict approach to equal effectiveness. He writes that ‘[t]he principle of consumer protection (P2) is broadly equally well satisfied by a duty to label (M1) as by a trade prohibition (M2). So for P2 it is [sic] irrelevant whether M1 or M2 is adopted’.<sup>44</sup> Alexy’s language – ‘broadly equally well satisfied’ – suggests that he must realise that a ban realises the purpose to a greater extent than labelling: yet, as his language suggests, the requirement must be interpreted to include some flexibility in order to render the necessity enquiry meaningful.

This discussion has shown that, if the requirement of equal effectiveness is understood too strictly, it can effectively render the necessity test otiose. This essentially leads to confusion and opens up the space for courts to vary the standard when expedient: courts will adopt a strict approach when they wish to save a government measure but

<sup>39</sup> See also P Yowell, ‘Proportionality in United States Constitutional Law’ ([chapter five](#) of this volume) text to fns 12–16 who describes this as a ‘technical approach’ to necessity and agrees that this renders the necessity enquiry of minimal importance.

<sup>40</sup> Barak (n 36 above) 339.

<sup>41</sup> *ibid.*, 340.

<sup>42</sup> This is a problem that affects both the suitability and necessity parts of the test: for a discussion, see *ibid.*, 331–33.

<sup>43</sup> BVerfGE 53, 135 (Germany): see the discussion of the case in Alexy (n 11 above) 398–99.

<sup>44</sup> Alexy (n 11 above) 399.

adopt a more flexible approach when they wish to strike such a measure down. The failure adequately to specify what is involved in the test can thus lead it to be applied inconsistently and to offer little protection for fundamental rights in controversial cases. This raises the question once again as to how best to understand the content of this component of the necessity enquiry and whether the strict interpretation correctly captures what is at stake in the enquiry. The next section of this chapter provides a detailed consideration of the various sub-components of necessity and, on this basis then seeks to evaluate its role within the broader proportionality enquiry as a whole.

### III. TOWARDS A MODERATE INTERPRETATION OF NECESSITY

In Section II, I sought to outline what I termed the strict interpretation of necessity (SN) and several difficulties that it causes. In order to address these problems, it is useful to break down the elements of this interpretation into four sub-components that are central to this enquiry:

(SN1) a range of possible alternatives to the measure the government wishes to employ must be identified ('the possibility component');

(SN2) the relationship between the government measure under consideration, the alternatives identified in SN1 and the objective sought to be achieved must be determined. Only those alternatives that are 'equally effective' in realising the objective must remain for consideration in the following parts of the test ('the instrumentality component');

(SN3) the differing impact upon fundamental rights of the measure and the alternatives identified in SN2 must be determined ('the impact component'); and

(SN4) given the findings in SN2 and SN3, an overall comparison must be undertaken between the government measure and the possible alternatives and a judgement made concerning whether the measure adopted by the government is the least restrictive of the rights in question that can achieve the government objective in comparison with all other possible and equally effective alternatives ('the comparative component').

I shall now seek to understand in more depth what is involved in each of these sub-components.

#### A. Possibility

On the strict interpretation of necessity, a measure will be necessary only if there is no possible alternative that will equally realise the objective whilst having a lesser impact on the right. This raises the question of what in fact is to be included within the realm of 'all possible alternatives'? Indeed, this notion plays a crucial role in the idea, defended by Alexy, that rights are optimisation principles; as we saw, the necessity principle flows logically from this conception in cases where two principles clash. If each principle must be realised to the greatest extent possible, how far does this extend? The field of possibilities considered will significantly determine how strict the necessity enquiry will be.

The wider the notion of possibility applied, the more alternatives there will be to a government measure and thus the harder it will be to show that measure as being necessary. I shall now consider some interpretations of possibility in this context and the difficulty of rendering this parameter entirely fixed.

When referring to what is legally possible (in the context of the balancing requirement), Alexy seems to be employing the idea of logical possibility.<sup>45</sup> The outer limits of logical possibility, however, do not seem to be apposite in the context of the necessity enquiry: first, such an understanding of possibility would render it extremely difficult for the legislature to establish that an infringing measure met the test of necessity given that alternative, logically possible measures could usually be imagined. The second problem is that these imagined logical possibilities may not be physically possible to achieve: an alternative to a measure, for instance, that involved the logical possibility that humans can fly without the aid of an aircraft could surely not pass any meaningful test of necessity.

What then about employing the notion of that which lies within the range of what is physically possible for human beings to achieve? Again, this notion is very broad and seems to place too severe restrictions on the legislature in attempting to justify a particular measure. It also fails to take account of the fact that what is physically possible may not be practically feasible: it may be physically possible to create overhead cable cars to transport people above cities, but so expensive and complex that it is not practically feasible.

Why not then use the notion of what is 'practically feasible?' This notion seems more promising yet it is important to recognise that it lacks the specificity of the other notions of possibility mentioned above. Feasibility itself can admit of differing interpretations: does this notion, for instance, include such constraints as economic scarcity (a measure is unaffordable for a country given current lending policies, although it could be affordable if these policies changed) or political sensitivity (a measure cannot be passed as it will cause massive protests and civil disobedience if it is)?<sup>46</sup> The way in which this requirement is interpreted will affect how the necessity test is applied. Feasibility also has certain dangers. If, for instance, political sensitivity is considered, then it can prevent the adoption of measures to accommodate minorities, for instance, where the majority finds these to be controversial. That would run counter to a rights-based society that is meant to accommodate individual freedom and difference. Economic scarcity could also always be used as a defence against alternatives to a government measure that are perhaps slightly more resource intensive. The standard of practical feasibility, if interpreted too weakly, runs the risk of offering too little protection for rights.

This discussion has sought to demonstrate that the notion of possibility that informs the consideration of alternatives is central to the necessity enquiry and will determine the stringency of the test that is applied. The strict interpretation of necessity assumes that this idea is clear and admits of definite application: as I have attempted to show it does not and admits of significant variability. How then should courts proceed in dealing with this factor? What is clear is that, if the necessity test is to have some bite, courts cannot simply defer to the government in determining the range of feasible alternatives. They also should not interpret the notion of 'feasibility' too restrictively and in a way

<sup>45</sup> Alexy (n 11 above) 51–53.

<sup>46</sup> Bilchitz (n 21 above) 434.

that runs counter to their role to ensure strong protection for fundamental rights. Ultimately, both parties must place before the court the leading alternatives they wish to be considered. If a claim is made that one of these is not feasible, then the court must interrogate these arguments and provide reasons for its finding.

An example of a court explicitly considering such a matter occurred in South Africa in *S v Williams*.<sup>47</sup> In this case, the Court found the imposition of corporal punishment as a sentence for juvenile offenders to be unconstitutional. The state argued that ‘sentencing alternatives for juveniles were limited and that this country did not have a sufficiently well-established physical and human resource base which was capable of supporting the imposition of alternative punishments’.<sup>48</sup> Langa J, writing for the majority, recognised that the Court needed ‘to examine available resources to determine whether there are indeed appropriate sentencing options. It has to be borne in mind that the presence of various options in a number of legislative provisions may not always reflect practical realities’.<sup>49</sup>

This was not determinative, however, and the Court believed it ‘important that resources should be made available and that they should be utilised properly, so that the values expressed in the Constitution may be upheld and maintained’.<sup>50</sup> The Court then proceeded to discuss some of the alternative possibilities that exist for punishing juveniles including correctional supervision and community service.<sup>51</sup> The Court here clearly recognises the need not to be side-tracked by considering ‘unfeasible’ alternatives; the constraints of the society had to be considered but courts also could not simply defer consideration of what was feasible to the legislature and accept its view of what resources were available. Ultimately, the values of the Constitution had to play a central role in determining what was to be considered a feasible alternative. The case thus shows that, far from being a technical formal enquiry, the very notion of possibility that lies at the heart of the necessity enquiry requires courts to engage in substantive and normative reasoning relating to the alternatives that are under consideration. Thus, it is evident that – in relation to this very first sub-component of necessity – any simple quantitative notion of ‘optimisation’ is not apposite and a range of qualitative factors come into the enquiry.

## B. Instrumentality

Once a court has identified the range of possible measures it will consider, it must turn to considering the relationship between these differing means under consideration and the objective sought to be achieved by the original governmental measure. Again, the notion of optimisation suggests that any alternative must realise the objective in question to the same *maximum* degree. Courts have often formulated the requirement as requiring each alternative worthy of consideration to be ‘equally effective’ in realising the objective in question. I have considered in Section II of this chapter the manner in which too strict an interpretation of this requirement effectively can render the necessity enquiry meaningless.

<sup>47</sup> *S v Williams* 1995 (3) SA 632 (CC) (South Africa).

<sup>48</sup> *ibid*, at [63].

<sup>49</sup> *ibid*, at [64].

<sup>50</sup> *ibid*.

<sup>51</sup> *ibid*, at [73] and [75].

It is important to recognise at this point that, once again, an understanding of this requirement has been bedeviled by the language of quantification and optimisation which is inapposite in this context. Courts are required to consider legal and policy measures and the extent to which they realise a particular purpose. It is important to chart the various qualitative judgements involved in this process.

First, of course, as the South African Constitutional Court points out, this requirement requires a careful analysis of the purpose of the provision in question.<sup>52</sup> If too strict an interpretation of the purpose is given, then the measure can effectively be guaranteed to be the only way to realise the purpose; if too weak or broad an interpretation is given, then alternatives can be considered that will very weakly achieve the purpose the government wishes to achieve. The manner in which a court characterises the purpose is thus significant for the necessity enquiry. As Barak puts it, '[t]he more the Court lowers the level of abstraction, the more difficult it is to find less drastic means for the realization of the object'.<sup>53</sup> Barak suggests that courts should determine a law's purpose in accordance with the 'actual purpose designated by the law'.<sup>54</sup> That is not a complete solution, however, since determining the actual purpose usually involves an act of construction on the part of the Court.<sup>55</sup>

Secondly, it is important to recognise that a judgement is required that two (or more) measures realise the purpose 'equally effectively'. The very nature of law and policy means that this judgement does not admit of exact quantification; we are in the realm of a qualitative judgement that the realisation of the purpose is 'more or less' equal. That immediately leads to some flexibility in the test itself. Yet, it may be argued that the very notion that an alternative must be equally effective is flawed and imposes too strict a requirement upon alternatives that are under consideration. McLachlin J in the Canadian *Hutterian Brethren* case formulates the problem as follows:

the court need not be satisfied that the alternative would satisfy the objective to exactly the same extent or degree as the impugned measure. In other words, the court should not accept an unrealistically exacting or precise formulation of the government's objective which would effectively immunise the law from scrutiny at the minimal impairment stage. The requirement for an 'equally effective' alternative measure . . . should not be taken to an impractical extreme.<sup>56</sup>

This dictum recognises that to insist upon an equally effective alternative will often involve too weak a test for the government measure to meet and thus embody too deferential an approach. The Canadian Supreme Court here also recognises that the purpose of the government can often be realised to differing degrees.

McLachlin J suggests an alternative formulation of the instrumentality sub-component that appears to be more consonant with the legal and policy context and can render the necessity enquiry a meaningful element of the proportionality enquiry. She holds that alternatives should be considered that

<sup>52</sup> Manamela (n 33 above), at [96].

<sup>53</sup> Barak (n 1 above), at 373.

<sup>54</sup> Barak (n 36 above), at 333.

<sup>55</sup> At the necessity stage, it appears to me that the goal of the court is to achieve a bona fide construction of the legislative purpose rather than any detailed evaluation of this purpose. Such an evaluation should be considered when the court considers whether the purpose is legitimate and in relation to whether its realisation justifies the infringement of the right at the final 'proportionality *stricto sensu*' stage. For a contrary view, see P Yowell (chapter five of this volume), text to fn 6.

<sup>56</sup> *Alberta v Hutterian Brethren of Wilson Company* 2009 SCC 38, at [55] (Canada).



give sufficient protection, in all circumstances to the government's goal . . . While the government is entitled to deference in formulating its objective, that deference is not blind or absolute. The test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective in a *real and substantial manner* (emphasis added).<sup>57</sup>

This re-formulation suggests that courts should not understand the test to require that a measure realise a purpose to exactly the same degree. That strict formulation generally only provides an excuse for a high degree of deference that offers little protection for fundamental rights. Instead, a more realistic standard is developed that allows courts to grapple with the question whether there are alternatives that realise the government's objective in a 'real and substantial manner'. The qualitative, normative judgement is here made explicit but allows the courts to deal in a more transparent manner with the *degree* to which alternative measures succeed in realising the objective and whether they cross a more realistic threshold of 'acceptability'.

### C. Impact

Once the possible measures have been identified that can realise the objective in a real and substantial manner, it becomes necessary to determine the impact of each of those measures on the fundamental rights of individuals. This enquiry requires ascertaining the degree to which a right is affected by the differing measures under consideration. The assumption here is that rights can be affected to differing degrees: some invasions, for instance, may go to the heart of the right whilst others affect it more peripherally.

In order to understand the degree of invasion, it is necessary to have a clear understanding of the underlying justificatory basis for the right as well as some understanding of its content. This is a matter that should often be addressed when determining whether there is indeed a *prima facie* infringement of a right prior to an application of the proportionality test.<sup>58</sup> If the court has not, at this first stage of analysis, engaged with the content of the right and specified the exact nature of the violation, it will need to do so as part of the necessity enquiry; only by doing so, will it be able to estimate the degree of invasion of the right. An assessment at this stage will also have to take place concerning the *degree* of impact that alternative measures would have on the right. Some 'vagueness' will of course attach to understanding the degree to which a right has been infringed by a measure and the various alternatives under consideration. Again, this is a qualitative normative judgement to be made by a court that does not admit of exact precision. I accept though that it is broadly possible to adopt a justifiable methodology to determine the degree to which a right is infringed.<sup>59</sup> The problem that arises at this stage is that courts often do not demonstrate a willingness to analyse the content of a right and thus fail to articulate a transparent normative basis upon which to justify the degree of impairment that differing alternatives may cause. Without doing so, however, in the

<sup>57</sup> *ibid.*, at [55].

<sup>58</sup> Indeed, in my view, it is crucial for the correct application of proportionality that the courts seek to understand, at the first stage of the enquiry, the substantive content of the right in the particular context and thus the nature of the violation that has taken place. Here, I disagree with P Yowell (chapter five of this volume) p 87, who suggests that all human rights adjudication can simply be collapsed into the proportionality enquiry.

<sup>59</sup> Alexy (n 11 above), for instance, suggests how this may be done with a three-stage scale of 'minor', 'moderate', and 'serious' elements (at 402).



context of the necessity enquiry, courts are left without an adequate basis to determine whether the government has indeed adopted means that are necessary.

#### D. Comparativity

Already at the two previous stages, it could be argued we are required to engage in a form of comparative reasoning. At the instrumentality stage, we are required to consider the relationship between means and ends of the government measure and various alternatives, and, at the impact stage, to consider the degree of the impact on fundamental rights of the government measure and various alternatives. SN4 requires us to bring these two stages together and to make a judgement that involves both of these criteria and determine whether the government measure is the least restrictive means of the feasible alternatives under consideration. This involves evaluating whether an alternative exists that realises the objective in a real and substantial manner whilst having a lesser impact on the right. A few important points need to be made here.

The first is that the judgement is ultimately comparative in nature. I have already outlined the difficulty of determining the range of alternatives that are considered in relation to what is to be understood as being 'possible'. Once the range is determined, courts are required to make a judgement that the measure adopted by the government is 'better than' any others that are available. If the notion of optimisation is to be of any use here, it means that the government measure is the best against the background of feasible alternatives. The judgement as to whether it is the 'best' in these circumstances also involves two dimensions: the manner in which it realises the objective and the impact on fundamental rights. Given the existence of these two axes in question, and the lack of precision in relation to each, the judgement ultimately becomes a more complex one than may initially be expected. Indeed, understanding the sub-components in the manner indicated above entails that the necessity enquiry will, to a degree, include within it an element of balancing.

To see why this is so, consider the following scenario. Let us imagine that a government measure (M1) realises an Objective (O1) to a certain degree and infringes a right to a certain degree (R1). Now, a court considers an alternative (M2) that realises the objective (O1) to a lesser (yet real and substantial) degree yet also infringes the right to a lesser degree (R1). Thus, M1 is better than M2 in the realisation of the objective (O1); yet M1 is worse than M2 in relation to its impact on the right in question (R1). The objective is still realised by M2 but not as well as in relation to M1; yet there is a clear difference in relation to their respective impact upon rights. The difficult question that arises is whether M1 is in fact necessary and whether less restrictive means exist in these circumstances?

This problem, for instance, arose for the Israeli Supreme Court in a case relating to the erection of a separation barrier between Israelis and Palestinians.<sup>60</sup> The Court determined the issue on the basis of the notion of the proportionality principle in international humanitarian law which is similar to its application in the context of limiting rights. The court found that the purpose of building the wall was to provide security for the citizens of Israel who faced terror attacks emanating from the occupied Palestinian territories. The existing route of the wall was challenged as having a drastic impact upon

<sup>60</sup> *Beit Sourik* (n 10 above).

the human rights of Palestinians. The Court was presented by the applicants with alternative routes for the barrier which would have a lesser impact upon the lives of Palestinians. The Court accepted, however, the perspective of the military that these alternative routes provided less security for Israelis. The Supreme Court thus considered the necessity test to have been met given that the suggested alternative routes would realise the security objective to a lesser extent. Instead, it decided the case in terms of the balancing component of proportionality (requiring the harms caused by a measure to be in proportion to its benefits). It found that

the military commander's choice of the route of the separation fence is disproportionate . . . [w]here the construction of the separation fence demands that inhabitants be separated from their lands, access to these lands must be ensured, in order to minimize the damage to the extent possible.<sup>61</sup>

Is the Court here correct to recognise that the test of necessity has been met by the military's measure and to focus its objection as being made under the third stage or balancing component of proportionality? It reaches this conclusion given a strict formulation of the instrumentality requirement of necessity: '[t]he question is whether the former route satisfies the security objective of the security fence to *the same extent* as the route set out by the military commander' (emphasis added).<sup>62</sup> Yet, as we have already seen, this formulation of the requirement is not apposite in the legal and policy context and is also too strict to render the test useful or meaningful. If we adopt the more moderate view of the Canadian Supreme Court, a means must be such as to realise the objective in a real and substantial manner. Once we weaken the test in this way, it becomes possible to recognise that two measures may both realise a government's objective in a substantive manner though one may be better at doing so than another. If the alternative to the government measure impacts upon rights to a lesser degree (even if less effective from the perspective of realising the objective), then it has to be determined whether the gain for fundamental rights can off-set the loss in respect of the government's objective. Here we see that a balancing component becomes part of the necessity enquiry itself. This is a clear consequence of recognising the qualitative dimensions involved in the necessity enquiry and the inadequacy of the strict understanding of instrumentality.

The reasoning in the *Beit Sourik* case could thus have declared the route of the wall unacceptable because of a failure to meet the necessity test. Indeed, the core of the reasoning that led to a finding of a lack of proportionality involved recognising that there was in fact an alternative route for the barrier which would have provided a little less security for Israelis yet significantly reduced the harms to Palestinians. Since an alternative existed that protected the security interests of Israelis in a real and substantial manner whilst having a lesser impact upon Palestinian rights, the measures adopted by the army were *not* necessary on the revised conception I have articulated above.

## E. The Relationship between Necessity and Balancing

Le Bel J in a dissenting opinion in the *Hutterian Brethren* case claims that 'proportionality analysis depends on a close connection between the final two stages in the *Oakes*

<sup>61</sup> *ibid*, at [61].

<sup>62</sup> *ibid*, at [58].

test'.<sup>63</sup> The above analysis provides reasons for this close connection between the last two stages. Yet, Dieter Grimm, for instance, has criticised the Canadian Supreme Court for incorrectly employing in the necessity enquiry a 'kind of language that is typical of the balancing process reserved for the third step in Germany'.<sup>64</sup> He contends that the reason for this approach may be to avoid too wide a discretion at the third stage of the proportionality enquiry which suggests that judges are involved too heavily in making value judgements that should be the preserve of elected branches. However, Courts in Canada, Grimm argues, risk 'self-deception when all the value-oriented considerations have been made under the guise of a seemingly value-neutral category'.<sup>65</sup> He suggests that it is important that different stages of the proportionality analysis be separated: '[a] confusion of the steps creates the danger that elements enter the operation in an uncontrolled manner and render the result more arbitrary and less predictable'.<sup>66</sup>

The argument I have provided through an analysis of the qualitative sub-components of necessity provides some support for the Canadian approach and demonstrates that an element of balancing is contained within the necessity enquiry when understood in a plausible manner. The importance of the second stage in Canada can be explained not only by an attempt to avoid value judgements on the part of the court but rather as a result of the inherent content of the enquiry. The discussion of these sub-components also highlights the fact that necessity is not simply a value-neutral or factual enquiry. It rather involves several substantive and qualitative elements that cannot be avoided by courts. I thus do not agree with Grimm that such judgements are called for only at the third stage of the proportionality enquiry; we are in agreement, however, that courts should not deceive themselves that they can avoid value judgements *even* in the second stage of the proportionality enquiry.

If balancing is included within the necessity enquiry, however, the question then becomes how are we to distinguish the second and third stages of the proportionality enquiry. Have we not essentially collapsed these two elements of the proportionality test and thus confirmed Grimm's fears of rendering the enquiry more amorphous and unstructured? It is important to point out that a similar but converse problem arises on the approach advocated by Barak, Grimm and the Israeli Supreme Court in *Beit Sourik*. By adopting a strict interpretation of equal effectiveness, they land up depriving the necessity enquiry of utility and essentially requiring all the work to occur at the third stage of the proportionality enquiry. Barak clearly writes that where any additional expense or burden is placed upon the state by an alternative measure, it should not be considered at the necessity stage but within the 'framework of proportionality *strict sensu*'.<sup>67</sup>

<sup>63</sup> *Hutterian Brethren* (n 31 above) [191]. Le Bel J goes on to say at [192] that 'it may be tempting to draw sharp analytical distinctions between the minimal impairment and balancing of effects parts of the *Oakes* test. But determining whether a measure limiting a right successfully meets the justification test should lead to some questioning of the purpose in the course of the proportionality analysis, to determine not only whether an alternative solution could reach the goal, but also to what extent the goal itself ought to be realized. This part of the analysis may confirm the validity of alternative, less intrusive means'. In a similar vein, he states at [195] that 'alternative solutions should not be evaluated on a standard of maximal consistency with the stated objective. An alternative measure might be legitimate even if the objective could no longer be obtained in its complete integrity'.

<sup>64</sup> Grimm (n 2 above) 395.

<sup>65</sup> *ibid.*, 397.

<sup>66</sup> *ibid.*

<sup>67</sup> Barak (n 36 above) 324–26.

The problem with collapsing the two stages and placing all the emphasis on the third stage is that the balancing that takes place there is itself highly controversial and has attracted much criticism from the academic community. It has been contended, for instance, that the third stage weakens the protection afforded to human rights<sup>68</sup> and provides too much discretion to courts, creating a serious separation of powers problem.<sup>69</sup> In this volume, Jochen von Bernstorff argues that the main problem with balancing is its ad hoc character. For him, balancing involves weighing ‘the seriousness of the infringement against the importance and urgency of the factors that justify it’.<sup>70</sup> ‘Ad hoc balancing turns human rights adjudication into an exercise of political decision-making, which fails to create and stabilise legal expectations within the legal system’.<sup>71</sup> This exacerbates the problems of providing too little protection to victims of fundamental rights violations as well as providing too much scope for judicial intervention with legislation. Von Bernstorff proposes a form of proportionality analysis that largely eschews ad hoc balancing. His alternative nevertheless requires courts to test measures that infringe rights for both suitability and necessity. Instead of the third stage, courts are invited to develop various sub-tests and bright-line rules for specific groups of cases that determine when the limitation of a right is justified or not.<sup>72</sup>

Much of von Bernstorff’s analysis is illuminating and deserves more detailed attention than I am able to provide here. It nevertheless remains important to point out that the implications of my argument in this chapter are that adopting von Bernstorff’s ‘bright-line’ rules will not eliminate some form of balancing from the alternative he suggests since a degree of balancing is included within the necessity enquiry itself, which von Bernstorff does not wish to dispense with. It is thus much harder to eliminate balancing from the proportionality enquiry than may have been thought.

Nevertheless, I do not believe my argument completely destroys von Bernstorff’s attempt to introduce more categorical reasoning into the proportionality enquiry. The reason for this is that it remains possible to distinguish the balancing that takes place within necessity from the balancing at the third stage of the enquiry.<sup>73</sup> This has implications both for the traditional proportionality enquiry as well as for von Bernstorff’s argument.

The balancing enquiry that takes place within the necessity enquiry is limited in nature. Ultimately, at the necessity stage, courts are concerned with evaluating the

<sup>68</sup> O Gross, ‘“Once More Unto the Breach”: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies’ (1998) 23 *Yale Journal of International Law* 437ff.

<sup>69</sup> T Alexander Aleinikoff, ‘Constitutional Law in the Age of Balancing’ (1987) 96 *Yale Law Journal* 943, 984–86.

<sup>70</sup> J von Bernstorff, ‘Proportionality Without Balancing: Why Judicial ad hoc balancing is unnecessary and potentially detrimental to the realisation of individual and collective self-determination’ (chapter two of this volume) p 63.

<sup>71</sup> *ibid.*, p 63.

<sup>72</sup> The scope of this chapter does not allow a detailed examination of von Bernstorff’s alternatives. I am broadly sympathetic to his attempt to strengthen human rights protection and to try and achieve a greater principled approach towards the limitation of rights that is not purely based upon ad hoc, case specific analysis. I, however, doubt it will be possible to develop the categorical rules von Bernstorff wants without engaging in some form of balancing reasoning in order to establish these rules. It nevertheless would be preferable to have certain general provisional rules that apply in specific cases rather than the much wider unstructured judgement often made by courts at the third stage of the proportionality enquiry.

<sup>73</sup> Here I disagree with Yowell (chapter five of this volume) p 87 who argues that the existence of some degree of balancing at the necessity enquiry ultimately leads to a collapse of the second and third stages of the proportionality enquiry into a single test of means–end proportionality. As I seek to indicate below, in my view, it is possible to recognise that a much more limited form of balancing occurs at the necessity stage than at the ‘proportionality *stricto sensu*’ stage.

feasible alternatives to the measure desired by the government. Those alternatives must be evaluated against the measure to determine whether there is at least one that realises the government's objective in a real and substantial manner but has a lesser impact on the right. As has been discussed above, this can involve the court in balancing a reduced effectiveness (in realising the government's objective) in an alternative measure against a lesser impact upon fundamental rights. The need to evaluate alternatives in this manner provides an important process of reasoning that is protective of fundamental rights since it requires an engagement with whether the government's very objective could have been achieved adequately with a lesser impact on fundamental rights. Importantly though, in the necessity enquiry, what remains of central importance are two axes: the relation between any means and the objective in question as well as the impact on fundamental rights. This involves a particular, more restrained focus for the balancing process that occurs in the necessity enquiry. It is hard to see how this more limited form of balancing can be removed from the proportionality enquiry without losing its essential character.

At the final stage of the proportionality enquiry, however, balancing involves a much wider enquiry. Let us say, for instance, it is concluded that a governmental measure is necessary. There still remains the question whether, in the context of the matter under review, the benefits of that measure (in relation to the purpose the government wishes to achieve) outweigh the costs for fundamental rights. As Grimm puts it, the two previous steps of the proportionality enquiry 'cannot evaluate the relative weight of the objective of the law, on the one hand, and the fundamental right, on the other, in the context of the legislation under review'.<sup>74</sup> Consider a law that allows the police to shoot a criminal to death if this is the only means to protect a property. Here, there is a lawful purpose and the law ensures that the means adopted are both suitable and necessary. Yet, '[i]f one had to stop here, the balance between life and property could not be made. The law would be regarded as constitutional and life would not get the protection it deserves'.<sup>75</sup>

The example illustrates correctly the kind of non-comparative normative enquiry required by the third stage of proportionality. Grimm, in this example, assumes that courts would reach a conclusion protective of life. Yet, it is equally possible that – in a context of widespread theft and robbery – courts would reach the opposite conclusion. The broad discretion involved in such value judgements at the third stage of the enquiry as well as the utilitarian cost–benefit calculus in particular cases with limited principled guidelines appears to be what rightly worry theorists such as von Bernstorff. Whether it is possible or desirable to remove the broader normative evaluation required by the third stage when considering the limitation of rights is a matter I cannot take further here. What I have sought to demonstrate, however, is that a more limited form of balancing cannot be eliminated from the necessity enquiry. This more restrained form of balancing can be distinguished from that which is traditionally undertaken at the third stage of the proportionality enquiry, thus leaving room for alternatives to the third stage such as those proposed by von Bernstorff.

<sup>74</sup> Grimm (n 2 above) 396.

<sup>75</sup> *ibid.*

## IV. CONCLUSION

Proportionality has become the *lingua franca* of today's conversation across borders concerning the circumstances under which it is appropriate to limit fundamental rights. This chapter has sought to engage with the necessity component of the proportionality enquiry. In Section II of this chapter I sought to identify what I termed the strict interpretation of necessity. I sought to demonstrate that this understanding of necessity can lead to two opposing problems: either it is considered to be too strong, triggering substantial deference on the part of courts to other branches or it is too weak as a result of a strict construal of the equal effectiveness component. Either way, the test fails to offer adequate protection for fundamental rights by inviting courts either to circumvent its requirements or simply rendering it meaningless. Section III of the chapter then sought to break down the enquiry into four parts and to consider what was entailed in each. Each component was seen to involve both qualitative and normative judgements that meant that the strict interpretation could not adequately be justified.

This analysis led to the conclusion that what I term a moderate interpretation of necessity (MN) needed to be adopted. The various components of MN can be summarised as follows:

(MN1) All feasible alternatives need to be identified, with courts being explicit as to criteria of feasibility;

(MN2) The relationship between the government measure under consideration, the alternatives identified in MN1 and the objective sought to be achieved must be determined. An attempt must be made to retain only those alternatives to the measure that realise the objective in a real and substantial manner;

(MN3) The differing impact of the measure and the alternatives (identified in MN2) upon fundamental rights must be determined, with it being recognised that this requires a recognition of approximate impact; and

(MN4) Given the findings in MN2 and MN3, an overall comparison (and balancing exercise) must be undertaken between the measure and the alternatives. A judgement must be made whether the government measure is the best of all feasible alternatives, considering both the degree to which it realises the government objective and the degree of impact upon fundamental rights ('the comparative component').

The moderate interpretation of necessity makes it clear that courts no longer are required to evaluate governmental measures against an unreasonably high standard. As Justice Kriegler stated in the South African Constitutional Court, '[w]here section 36(1)(3) speaks of less restrictive means it does not postulate an unattainable norm of perfection'.<sup>76</sup> As I have sought to show, however, the enquiry is not some overarching amorphous judgement. Necessity involves a process of reasoning designed to ensure that only measures with a strong relationship to the objective they seek to achieve can justify an invasion of fundamental rights. That process thus requires courts to reason through the various stages of the moderate interpretation of necessity.

<sup>76</sup> *S v Mamabolo* 2001 (3) SA 409 (CC), at [49] (South Africa).

The more moderate interpretation of necessity allows courts also to move away from any general strategy of deference; rather, courts must sensitively evaluate the evidence put before them by both parties in relation to each stage of the necessity enquiry. Where other branches of government have institutional advantages and expertise, courts may, in cases where the evidence is finely balanced, find in favour of the government as they are better placed to make the qualitative judgements involved. This should not involve any general presumption in favour of the government but rather allows for its evidence and arguments to be given more weight where they are presented on matters in which the government has greater institutional capacity and expertise. The converse will also apply in that its evidence and arguments will be given less weight in determining the impact on rights, for instance, where the applicant may have greater knowledge and understanding.

The key purpose of the necessity enquiry is to offer an explicit consideration of the relationship between means, objectives and rights. The discipline of this reasoning process helps identify flaws in any attempted justification for the limitation of fundamental rights. The process, as I have argued, is not mechanical nor is it factual. It is essentially normative and qualitative in nature. Failure to conduct the necessity enquiry with diligence, however, means that a government measure can escape close scrutiny in relation to both the realisation of the objective and its impact upon fundamental rights.

Fundamental rights are not absolute, yet they deserve strong protection. The way in which the necessity enquiry is conducted can tend towards either rendering these rights absolute or offering them little protection. I have sought in this piece to highlight certain ways in which courts and academic writers have approached the matter which tend towards these two extremes. Instead, I have sought to grapple with the complexity of the enquiry itself, to demonstrate that a more moderate interpretation is possible which affords significant protection for rights but allows for their limitation in suitable circumstances. Ultimately, good judgement is ineliminable from a determination of necessity; a clear reasoning process helps to guide the judgements that must be made through clarifying the nature of the enquiry and normative considerations in question.



*Proportionality Without Balancing:  
Why Judicial Ad Hoc Balancing is  
Unnecessary and Potentially Detrimental  
to the Realisation of Individual and  
Collective Self-determination*

JOCHEN VON BERNSTORFF

I. INTRODUCTION

**A**D HOC BALANCING is a particular form of judicial reasoning which can be applied as the third and last subcomponent of the proportionality test in human rights adjudication. Judicial proportionality tests which include this component are generally structured as follows: i) Is the measure a suitable means of achieving the desired end? ii) Is the measure necessary to achieve the desired end? iii) Does the measure have an excessive impact on the interests of the rights holder? In this last stage, which is also known as proportionality *stricto sensu*, judges often apply a methodology of ad hoc balancing. Its central idea is to ‘balance’ or ‘weigh’ the public interests pursued by the disputed public measure at hand against the interests of the affected rights-holder. More and more, constitutional, supreme, and international courts rely on this form of reasoning as a decisive last element of their proportionality analysis.<sup>1</sup>

On a more abstract level proportionality analysis in general is also a pragmatic judicial response to an intractable conflict in human rights adjudication: rights claims can potentially collide with the rule of the majority as expressed in parliamentary legislation.<sup>2</sup> Yet, the constitutional commitment of liberal democracies to both the protection of individual liberties and democratic majority rule makes it conceptually difficult, if not

<sup>1</sup> Well-known examples are the German Constitutional Court, the South African Supreme Court, the Supreme Court of Israel and the European Court of Human Rights; on the different forms of proportionality reasoning employed by these courts see below in Section III.A.

<sup>2</sup> Leading to what in US scholarship has famously been termed the ‘counter-majoritarian difficulty’ created by judicial review: ‘[J]udicial review is a counter-majoritarian force in our system . . . [W]hen the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of representatives of the actual people of the here and now’, Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd edn (New Haven CT, Yale University Press, 1986) 16–17; see also Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2005–06) 115 *Yale Law Journal* 1346.



impossible, to generally prioritise one over the other. As to the textual basis of judicial reasoning in this area, many constitutions and international covenants explicitly allow for restrictions of individual rights on a statutory basis, thereby incorporating the Kantian insight that one's freedom is always limited by the like freedom of everyone else.<sup>3</sup> Given that human rights entitlements are generally phrased in vague and indeterminate language and often provide little textual guidance for their own delineation, ad hoc balancing provides judges with a methodology to handle (through 'weighing') conflicting public and private interests in a recurrent structure<sup>4</sup> and on a common metaphorical basis. Ad hoc balancing was originally introduced by the German Constitutional Court in a 1950s post-authoritarian political setting as a new methodology for intensive judicial review of rights-restricting legislation.<sup>5</sup> It was later adopted by a number of other influential judicial bodies, including the constitutional courts of Israel, South Africa and Canada as well as the European Court of Human Rights. According to some academic observers, balancing has become the primary universal form of constitutional reasoning, a judicial methodology that almost all modern constitutional systems allegedly have in common.<sup>6</sup>

From a scholarly perspective, the issue of judicial ad hoc balancing remains a particularly divisive one. It should be added that it has actually always been a contentious issue in the various national scholarly debates, but that it has only recently become a central topic of what can be called an emerging global discipline of comparative constitutional law.<sup>7</sup> The scholars who support and defend it hold it to be a necessary element of proportionality reasoning.<sup>8</sup> To rely on the first two steps of proportionality reasoning alone (suitability and necessity) would, in their view, lead to unjustified outcomes. Ad hoc balancing is thus supposed to correct problematic results produced by the first two stages of the proportionality analysis.<sup>9</sup> Moreover, the explicit judicial 'weighing' of the various interests involved is meant to increase an open, transparent and discursive culture of human rights adjudication.<sup>10</sup>

<sup>3</sup> And it is the task of the law to define the outer limits of individual spheres of freedom in order to enable the co-existence of one's own freedom with the freedom of others. 'Das Recht ist also der Inbegriff der Bedingungen, unter denen die Willkür des einen mit der Willkür des anderen nach einem allgemeinen Gesetze der Freiheit zusammen vereinigt werden kann': Immanuel Kant, 'Die Metaphysik der Sitten, Rechtslehre, Einleitung in die Rechtslehre', § B in Wilhelm Weischedel (ed), *Die Metaphysik der Sitten Werkausgabe*, vol 8, 13th edn (Frankfurt aM, Suhrkamp, 2003) 337.

<sup>4</sup> Positively on the structure provided by ad hoc balancing David Beatty, 'Law and Politics' (1996) 44 *American J of Comparative L* 131, 172.

<sup>5</sup> *Lüth* [1958] BVerfGE 7, 198, 210–12 (Germany).

<sup>6</sup> David Beatty (n 4 above) 142 ff.

<sup>7</sup> On the US debates: T Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale LJ* 943; on the German debates: Peter Lerche, 'Stil und Methode der verfassungsrechtlichen Entscheidungspraxis' in Peter Badura (ed), *Festschrift 50 Jahre Bundesverfassungsgericht, Bd 1: Verfassungsgerichtsbarkeit – Verfassungsprozess* (Tübingen, Mohr Siebeck, 2001) 333, 342–43; Bernhard Schlink, 'Der Grundsatz der Verhältnismäßigkeit' in Peter Badura and Horst Dreier (eds), *Festschrift 50 Jahre Bundesverfassungsgericht, Bd 2: Klärung und Fortbildung des Verfassungsrechts* (Tübingen, Mohr Siebeck, 2001) 445.

<sup>8</sup> Robert Alexy, 'The Construction of Constitutional Rights' (2010) 4 *L & Ethics of Human Rights* 21, 26 ff; Aharon Barak, 'Proportionality and Principled Balancing' (2010) 4 *L & Ethics of Human Rights* 3, 11 ff; Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *U of Toronto LJ* 383, 396; with a differentiated defence of various forms of judicial balancing in human rights adjudication, Kai Möller, *The Global Model of Constitutional Rights* (Oxford, OUP, 2012).

<sup>9</sup> Grimm (ibid), 396.

<sup>10</sup> Matthias Kumm, 'Fundamental Rights as Principles' in Augustin J Menéndez and Erik O Eriksen (eds), *Fundamental Rights Through Discourse. On Robert Alexy's legal theory. European and Theoretical Perspectives* (Oslo, Arena, 2004) 201, 232.

From a more theoretical perspective, Alexy famously conceives ad hoc balancing as a necessary consequence of the structure of human rights.<sup>11</sup> For him, human rights are not rules with a deontic character but merely ‘principles’ in the sense that they only require that something be realised to the greatest extent possible, given the factual and legal possibilities at hand. They only constitute ‘optimization requirements’ meaning that the legal possibilities for the realisation of rights are essentially determined by opposing principles. According to his extremely influential theory of rights ‘the determination of the appropriate degree of satisfaction of one principle relative to the requirements of another principle is balancing’.<sup>12</sup> Through Alexy’s work ad hoc balancing has been theoretically elevated and dignified – it no longer constitutes a merely practically- or politically-motivated methodological choice of the 1950s German Constitutional Court. Instead, it is now seen by many scholars and judges alike as a theoretical necessity and as the new paradigm, flowing from the alleged internal structure of rights.

At the same time the global rise of ad hoc balancing in judicial practice and its relatively widespread scholarly endorsement has provoked strong criticism from both constitutional and international law scholars. The German Constitutional Court has recently come under a new wave of scholarly attacks for stifling collective self-determination through its general methodological approach to human rights adjudication.<sup>13</sup> Moreover, particularly harsh criticisms have been levelled against the European Court of Human Rights, according to which its excessive reliance on ad hoc balancing has produced a highly politicised form of adjudication.<sup>14</sup> In the view of some observers, the Court has failed to erect and protect minimum human rights guarantees in a reliable fashion.<sup>15</sup> On a more theoretical level, Alexy’s theoretical attempts to theoretically consolidate and defend the judicial practice of ad hoc balancing have, since the early 1990s, generated a long and unabated stream of critique from both a norm-theoretical and a separation of powers perspective. The various critiques of ad hoc balancing as a judicial practice have revolved around three basic arguments: first, ad hoc balancing is based on a mistaken conception of rights as ‘principles’;<sup>16</sup> secondly, ad hoc balancing as a form of ‘weighing’ *prima facie* incommensurable interests cannot be rationalised;<sup>17</sup> and thirdly, this form of reasoning produces a separation of powers problem by

<sup>11</sup> Alexy (n 8 above) 21–22.

<sup>12</sup> Alexy (n 8 above) 21.

<sup>13</sup> Matthias Jestaedt, Oliver Lepsius, Christoph Möllers and Christoph Schönberger, *Das entgrenzte Gericht. Eine kritische Bilanz nach 60 Jahren Bundesverfassungsgericht* (Frankfurt aM, Suhrkamp, 2011).

<sup>14</sup> Critically assessing its jurisprudence: Steven Greer, ‘Constitutionalizing Adjudication under the European Convention on Human Rights’ (2003) 23 *Oxford Journal of Legal Studies* 405; Oren Gross, ‘Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies’ (1998) 23 *Yale Journal of International Law* 437 ff; Aileen McHarg, ‘Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights’ (1999) 62 *Modern Law Review* 671, 673.

<sup>15</sup> Gross (ibid), 437 ff; McHarg (ibid), 673.

<sup>16</sup> Habermas insists on the deontic character of human rights, Jürgen Habermas, *Faktizität Und Geltung* (Frankfurt aM, Suhrkamp Verlag, 1992) 317; in the same vein, Massimo La Torre, ‘Nine Critiques to Alexy’s Theory of Fundamental rights’ in Augustin J Menéndez and Erik O Eriksen (eds), *Fundamental Rights Through Discourse* (Oslo, Arena, 2004) 77, 81–85.

<sup>17</sup> On incommensurability cf Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge, CUP, 2009) 89; Lorenzo Zucca, *Constitutional Dilemmas: Conflict of Fundamental Legal Rights in Europe and the USA* (Oxford, OUP, 2007) 85.

empowering courts to impose their own political considerations on democratically-elected parliaments.<sup>18</sup>

Scholars defending judicial ad hoc balancing have reacted to such criticism in various ways. Dieter Grimm, a former judge of the German Constitutional Court, tries to integrate judicial respect for democratically-elected bodies into the exercise of ad hoc balancing.<sup>19</sup> Alexy and his followers attempt to mathematically objectivise the balancing exercise in order to be able to reject the charge of judicial irrationalism.<sup>20</sup> To put it simply, the various justifications of ad hoc balancing reacting to the critique can be summarised as follows: granted, ad hoc balancing comes with certain risks, but these risks can be mitigated by a careful judicial handling of this methodology and the use of calculators. The main underlying contention, however, seems to be that in the alleged absence of viable alternatives, judicial ad hoc balancing and its presumed ability to produce outcomes tailored to the individual case at hand, remains a necessary and somehow inevitable component of proportionality reasoning. Hence the famous *dictum* of the Israeli Supreme Court Justice Barak on balancing in the area of the right to life: 'Despite the difficulty of that balancing, there's no choice but to perform it'.<sup>21</sup>

In what follows I shall critically assess the assumption that judicial ad hoc balancing is an indispensable and particularly valuable element of proportionality reasoning in human rights adjudication. The main problem with ad hoc balancing in my view is not the often criticised irrational element involved in the ad hoc balancing exercise, including its underlying assumption that *prima facie* incommensurable values and interests can somehow be 'weighed up' objectively. The critics are of course right in pointing out that proportionality as a form of practical reasoning requires judges to rely on 'their own sense of right or wrong'.<sup>22</sup> Searching for a mathematically objectifiable basis of human rights adjudication, however, seems to be an extremely ambitious if not futile mission to begin with. Instead, its main problem is its ad hoc character. The move to ad hoc balancing openly endorses a concept of the judiciary that liberates judges from any responsibility to perform a specific role within the legal system. Not only do judges become law-makers – that is to a certain extent inevitable in judicial review. Rather, ad hoc balancing turns human rights adjudication into an exercise of political decision-making, which fails to create and stabilise predictability within the legal system. Strictly speaking ad hoc balancing thus does not even qualify as *law-making*, as many critiques would have it. In the absence of a judicial contribution to recognisable legal structures beyond the individual case at hand, human rights adjudication becomes potentially too lenient from the perspective of the victims of severe infringements of human rights, and potentially overly intrusive from a separation of powers perspective.

My own arguments draw on various existing critiques of ad hoc balancing. However, the main thrust of my arguments is inspired by a formalist bias, which values legal certainty, as well as by a (Kantian) conception of rights as *legal* rules with an anti-

<sup>18</sup> Aleinikoff (n 7 above) 984–86; for the German discussion cf. Schlink (n 7 above) 460–62; Ernst-Wolfgang Böckenförde, 'Grundrechte als Grundsatznormen. Zur gegenwärtigen Lage der Grundrechtsdogmatik' (1990) 29 *Der Staat* 1, 20 ff.

<sup>19</sup> Grimm (n 8 above) 396.

<sup>20</sup> Alexy's 'weight formula', Alexy (n 8 above) 28.

<sup>21</sup> The Supreme Court Sitting as the Israeli High Court of Justice, HCJ 769/02, *The Public Committee Against Torture in Israel v The Government of Israel* (11 December 2005), para 46 (Israel).

<sup>22</sup> cf. Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 1, 6; Grégoire Webber, 'Legal Reasoning and Bills of Rights' (2011) 1 *LSE Law, Society and Economy Working Papers* 1, 20.

utilitarian *telos*.<sup>23</sup> This standpoint favours collective self-determination in the definition and delineation of rights as well as a practice of judicial review which employs a distinctively *legal* methodology in protecting individual liberties against particularly intensive infringements of individual liberties. From this perspective, ad hoc balancing as a judicial methodology fails both on a functional and on a rights-holder oriented account: By empowering judges to perform an essentially political task of ‘weighing’ conflicting interests, it stands in the way of developing a distinctively *legal* methodology of judicial human rights protection;<sup>24</sup> and secondly it fails to erect a body of human rights jurisprudence which provides legal certainty and predictability with regard to particularly intensive infringements of human rights.

Instead, I will argue in favour of judicial proportionality reasoning without ad hoc balancing as well as in favour of a culture of judicial commitment to bright-line rules when it comes to particularly intensive infringements of human rights. Such bright-line rules can be judicially constructed by reference to the ‘essence’, ‘substance’ or ‘core’ of a particular right *ex negativo* for specific groups of case scenarios, or by other generalisable tests or ‘intervention thresholds’, such as the famous *Brandenburg* test of the US Supreme Court.<sup>25</sup> These alternative forms of judicial reasoning will be subsumed under the term ‘categorical’ reasoning and tested with reference to four specific cases in which the respective courts actually relied on balancing techniques.<sup>26</sup> This is neither a plea for ‘originalism’ nor a naïve attempt to exorcise the ‘political’ from constitutional jurisprudence through a more ‘objective’ methodology. For, despite its abstinence from ad hoc – balancing, ‘originalism’ tends to come with its own ideological baggage and I do of course concede that constitutional adjudication will always have a strong political dimension that could never be fully excluded by methodological adjustments.<sup>27</sup> In contrast to other critiques of human rights adjudication I will defend a general practice of judicial review including in exceptional cases of parliamentary legislation. My aim is to sketch an alternative and more formalised vision of human rights adjudication, namely a judicial approach which – in full cognisance of the relative indeterminacy of human rights provisions – recedes into semantically more accountable forms of reasoning vis à vis both parliaments and individual rights holders.

As a first step I will briefly argue why, from a theoretical perspective, scholarly scepticism vis à vis judicial ad hoc balancing is warranted (II). This will be followed by a Section which makes a proposal for an alternative method of proportionality analysis and tests this proposal in the light of selected cases from various constitutional courts and the European Court of Human Rights (III). The last part will sketch an alternative vision of human rights adjudication against the background of what can be termed as a

<sup>23</sup> ‘Handle so, dass du die Menschheit, sowohl in deiner Person, als in der Person eines jeden anderen, jederzeit zugleich als Zweck, niemals bloß als Mittel brauchst’, Immanuel Kant, ‘Grundlegung zur Metaphysik der Sitten’ in Wilhelm Weischedel (ed), *Werkausgabe und Immanuel Kant*, vol 7, 19th edn (Frankfurt aM, Suhrkamp Verlag, 2000) 61; Relying on Kant in his famous concept of rights as ‘trumps’ is Ronald Dworkin, *Taking Rights Seriously – New Impression with a Reply to Critics* (London, Duckworth, 1978) 197–200. On Dworkin’s concept of rights: Richard H Pildes, ‘Dworkin’s Two Conceptions of Rights’ (2000) 29 *Legal Studies* 309.

<sup>24</sup> Aleinikoff (n 7 above) 962–63, Webber (n 22 above) 20.

<sup>25</sup> *Brandenburg v Ohio*, 395 US 444, 447 (1969) (United States).

<sup>26</sup> On the distinction between ‘categorical’ and ‘balancing’ styles of adjudication, cf Stefan Sottiaux, *Terrorism and the Limitation of Rights: the ECHR and the US Constitution* (Oxford, Hart Publishing, 2008) 23–32.

<sup>27</sup> See on the history and critique of US originalism, Larry Kramer, ‘Two (more) Problems with Originalism’ (2008) 31 *Harvard Journal of Law & Public Policy* 907 ff.

looming credibility crisis of human rights adjudication in various constitutional and international settings (IV).

## II. WHY AD HOC BALANCING IS POTENTIALLY DETRIMENTAL TO THE REALISATION OF COLLECTIVE AND INDIVIDUAL SELF-DETERMINATION

The *raison d'être* of human rights as constitutional or conventional rights is the protection of individual liberties. This end is primarily achieved through legislation which concretises and delineates individual spheres of freedom through a constitutionally prescribed procedure of collective self-determination.<sup>28</sup> Parliaments thus have the primary role in ensuring the protection of civil liberties by virtue of their future-oriented law-making function. By contrast, the role of the judiciary in human rights protection is only of a subsidiary nature. Normally, courts only become involved in human rights protection through individual complaints referring to particular incidents which took place in the past. Hence, the main task of the judiciary is to retrospectively control the application of legislation by the executive branch.<sup>29</sup>

In most constitutional settings, courts also have the function of reviewing the legislation itself in light of constitutionally enshrined human rights provisions. The critique of judicial ad hoc balancing developed in this contribution is mainly directed against this particular form of judicial review. This function is theoretically much more problematic than the first one, since it enables courts to correct and modify the decisions of democratically-elected bodies. Historically, the (two-tiered) proportionality test as applied and developed by the Prussian administrative courts in the nineteenth and early twentieth century was exclusively applied to review acts of the executive branch.<sup>30</sup> From a legal or constitutional perspective, judicial powers to also review parliamentary legislation are often justified by reference to the nature of higher ranking constitutional or international human rights norms as binding all institutions, including the legislature.<sup>31</sup> However, from a philosophical perspective the justification of such judicial interferences with acts of collective self-determination is more problematic. The best way to look at the issue lies in the Kantian insight regarding the interdependent relationship between individual and collective self-determination.<sup>32</sup> Thus, without judicially enforced respect for the substance of the various civil liberties, individual self-determination as an instrumental precondition for the exercise of collective self-determination may be undermined. At the same time collective self-determination is instrumental for legitimately delineat-

<sup>28</sup> Kant (n 3 above) § B; Webber (n 22 above) 10.

<sup>29</sup> On the role of the judiciary in constitutional theory from a Kantian perspective, cf Christoph Möllers, *Die drei Gewalten. Legitimation der Gewaltengliederung in Verfassungsstaat, europäischer Integration und Internationalisierung* (Weilerswist, Velbrück, 2008) 100 ff.

<sup>30</sup> On the development of the proportionality doctrine in 19th-century German jurisprudence cf Barbara Remmert, *Verfassungs- und verwaltungsrechtsgeschichtliche Grundlagen des Übermaßverbots* (Heidelberg, Müller, 1995) 163–66.

<sup>31</sup> Article 1 para 3 of the German Constitution for instance stipulates that the human rights enshrined in the Basic Law constitute binding norms also for the legislature.

<sup>32</sup> Habermas in his reading of the Kantian tradition of rights, reconstructed to what extent individual and collective self-determination are interdependent categories; cf Habermas (n 16 above) 154 f; see also Christoph Menke and Arnd Pollmann, *Philosophie der Menschenrechte zur Einführung* (Hamburg, Junius, 2007) 174–77.

ing conflicting spheres of individual freedom through legislation.<sup>33</sup> This interdependent relationship between individual freedom and democratic self-government is particularly obvious for the right to freedom of speech, but can nonetheless be argued for all essential spheres of freedom guaranteed by human rights norms.<sup>34</sup> The delineation of the spheres of individual or societal spheres of freedom (science, arts etc) is a politically controversial matter and should normally be decided by the democratically-elected bodies after a process of public deliberation. Only if and when an individual or societal sphere of autonomy in its core function is endangered by a legislative measure should courts intervene in order to guarantee the substance of that particular sphere of freedom.

But how should courts, in methodological terms, intervene in these situations? By applying particular human rights provisions to individual cases, courts enforce human rights provisions as actors of the legal system. They perform a legal function and by doing so they need to apply a juridical methodology in deciding particular cases. A decisive requirement of any judicial methodology is a certain degree of coherence and predictability with regard to the application of particular legal provisions. Other actors in the legal and political system expect courts to treat like cases alike, which can be regarded as the very essence of the principle of legality.<sup>35</sup> Obviously each new case inevitably differs from previous cases in various aspects and many great scholars, ranging from Kelsen and Hart to Fuller and Dworkin have conceded that each application of a legal norm to a new case must therefore be conceptualised as necessarily including a creative element.<sup>36</sup> Kelsen for instance understands judicial decisions as individual norm-setting through interpretation.<sup>37</sup> A new individualised norm is being created by the judiciary in every judgment through the interpretation of legal texts. This creative act of interpretation, however, can still be distinguished from law-making by parliamentary institutions, since the judiciary must in their reasoning refer to existing legal rules and because of the reactive or negative function of the act. In Kelsen's words, constitutional adjudication constitutes 'negative legislation' through interpretation of constitutional norms. The decision cannot simply be justified with political or moral arguments alone – instead it needs to establish a link to an applicable human rights norm and relevant legislation. Moreover, due to their legal function, courts need to give reasons which can be discerned as genuinely *legal* arguments as to why a particular provision has been violated or not. Given the rather abstract formulations of many constitutional or conventional human rights provisions, it is indeed a particular challenge for courts to develop a consistent and distinctively legal methodology for the application of human rights norms.

In line with this conception of judicial decision making, an appropriate judicial methodology must meet two requirements: first it must respect the constitutional competence

<sup>33</sup> The idea of '*Gleichsprünglichkeit*' is of course the central Kantian-inspired idea in Habermas, *Faktizität und Geltung* (n 16 above).

<sup>34</sup> Including economic, social and cultural rights.

<sup>35</sup> See Kelsen's theoretical interpretation of the notion of equality in any given legal system: Hans Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organisation' (1944) 53 *Yale Law Review* 207, 209.

<sup>36</sup> Hans Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (Leipzig and Vienna, F Deuticke, 1934) 97–99; Ronald Dworkin, *Law's Empire* (Cambridge MA, Belknap Press of Harvard University Press, 1986); Joseph Raz, *The Authority of the Law: Essays on Law and Morality* (Oxford, OUP, 1979) ch 10; on the various theoretical approaches to judicial interpretation and law-making Duncan Kennedy, *A Critique of Adjudication: fin de siècle* (Cambridge MA, Harvard University Press, 1998) 26–39.

<sup>37</sup> Kelsen (*ibid*) 97–99.



of parliaments to concretise and delineate individual spheres of freedom through legislation; and secondly, it should increase certainty as to the legal limits of particularly intensive state interference in specific individual liberties derived from specific human rights provisions.<sup>38</sup> In this way a predictable jurisprudence on human rights violations can contribute to legal certainty as an element of the rule of law. Once it has been rendered, the judgment will generally have *res judicata* effect for the parties involved. Moreover, as a specifically legal communication it will form part of a broader legal discourse, which will include other courts and various other actors of the legal system as well as the same court in subsequent judgments.<sup>39</sup> An ideal judicial decision will apply sufficiently precise prohibitions or entitlements addressed in the text of the norm; refer to semantic categories developed in previous judgments; or, if necessary, erect new categories that will modify argumentative burdens in subsequent decisions. Both in the common law and the civil law tradition judicial reasoning ideally refers to similar previous cases and justifies why the same or a different decision in the case at hand is warranted. This enables a judicial practice which in the common law tradition is referred to as ‘distinguishing and overruling’.<sup>40</sup> All of this certainly involves a creative and ultimately political element of interpretation by the judiciary, but ideally with semantic references to the constitutional text, the wording and structure of the applicable human rights norms, and previous judgments.

What are then the general shortcomings of ad hoc balancing in light of this functional account of judicial decision-making? It is empirically undisputable that judicial decision-making based on ad hoc balancing can potentially ensure the protection of individual rights vis à vis state infringements in individual cases. Yet, the main problem of ad hoc balancing is that it fails to erect stable and predictable standards of human rights protection. Ad hoc balancing generally liberates constitutional adjudication from the tedious tasks of interpreting the text and structure of the constitutional norm and the requirement of treating like cases alike, given that, simply put, for the ad hoc balancer there *are* no like cases. The culture of ad hoc balancing cherishes uniqueness, individual justice and contextual sensitivity. It is a judicial culture which has moved beyond inflexible practices of formal rule application and principled reasoning. Granted, from the point of view of judges, a more convenient form of reasoning than ad hoc balancing can hardly be imagined. Each judgment can be semantically tailored to the political context and the specific circumstances of the case. Given that each case has new individual features which will be assessed in a relatively unconstrained and, *qua* methodology, always unique balancing exercise, argumentative burdens and limits imposed by prior judgments are largely absent. In theory, each ad hoc balancing act can enter a new, open and substantively undetermined space of judicial argumentation.

It is precisely its in-built flexibility which turns ad hoc balancing into a highly problematic form of judicial reasoning. That is to say by providing judges with an almost unlimited degree of flexibility in each individual case, the move to ad hoc balancing is a

<sup>38</sup> On the value of legal certainty in constitutional adjudication cf. Frederick F Schauer, *Playing by the Rules* (Oxford, OUP, 1991) 137–45.

<sup>39</sup> Armin von Bogdandy and Ingo Venzke, ‘In Whose Name? An Investigation of International Courts’ Public Authority and of its Democratic Justification’ (2012) 23 *European Journal of International Law*, available at: [ssrn.com/abstract=1593543](https://ssrn.com/abstract=1593543).

<sup>40</sup> Oliver Lepsius, ‘Die maßstabsetzende Gewalt’ in M Jestaedt, O Lepsius, C Möllers and C Schönberger (eds), *Das entgrenzte Gericht* (Berlin, Suhrkamp Verlag, 2011) 200–202.

political project.<sup>41</sup> It can be conducive to a judicial practice which reacts smoothly to political pressures from governments, particularly when it comes to intensive governmental infringements in times of civil unrest or other threats to public and private security. Thus, even the most intensive infringements of civil liberties can be conveniently balanced out of existence when the stakes are high enough.<sup>42</sup> As to the separation of powers aspect, the lack of predictability leads to a situation where every act of parliament is potentially up for grabs in the judicial balancing exercise. Ad hoc balancing dramatically aggravates the counter-majoritarian difficulty of constitutional adjudication. When the legislature can never be sure that a bill will pass judicial review in the balancing stage, human rights adjudication starts to deeply intervene in the exercise of collective self-determination. There seems to be a relatively strong consensus among scholars that ad hoc balancing potentially collides with the right of the legislature to delineate colliding spheres of individual freedom under human rights guarantees, but at the same time many scholars hold this to be an unavoidable consequence of judicial review.<sup>43</sup> From the normative perspective developed in this contribution, which values collective self-determination and predictable judicial application of human rights as legal rules, a methodologically induced and doctrinally unrestrained flexibility in human rights adjudication becomes a nightmare.

This is not to say that there is no room for proportionality tests in human rights adjudication. Quite the contrary is the case. Proportionality tests help to judicially control the application of limitation clauses of human rights provisions by the legislature and public authorities. As such they are an indispensable part of human rights adjudication. Proportionality tests are being used to test the suitability and the necessity of governmental restrictions of a particular human right. Only when these tests rely on ad hoc balancing as the third or fourth tier of the test, they arguably lose their character as a distinctive *legal* methodology to assess whether or not a particular human right has been violated or not. Furthermore, as I attempt to demonstrate in this contribution, the existence of an explicit ad hoc balancing element in human rights adjudication has the problematic tendency to devour the other stages of proportionality testing or to ultimately render them meaningless.

### III. WHY AD HOC BALANCING IS UNNECESSARY: A COMPARATIVE PERSPECTIVE

#### A. The Two Models of Proportionality Reasoning

With the foregoing general remarks on the role of the judiciary in human rights adjudication and potential problems of ad hoc balancing in mind, I now want to explain in

<sup>41</sup> Jarna Petman, 'Egoism or Altruism? The Politics of the Great Balancing Act' (2008) 5 *No Foundations: Journal of Extreme Legal Positivism* 113.

<sup>42</sup> On US developments cf. Geoffrey R. Stone: 'As American courts have learned from experience, unstructured inquiries into "reasonableness" in the realm of individual liberties too often result in the sacrifice of fundamental rights in the face of what seem at the time of decision to be more pressing societal needs. Clear, narrowly-defined standards are more likely in the long run to preserve fundamental liberties, for they are less to induce courts in stressful times to "balance" those rights out of existence'. Geoffrey R. Stone, 'Limitations on Fundamental Freedoms: The Respective Roles of Courts and Legislatures in American Constitutional Law' in Armand de Mestral et al. (eds), *The Limitation of Human Rights in Comparative Constitutional Law* (Montreal, Les Éditions Yvon Blais, 1986) 182.

<sup>43</sup> Barak (n 8 above) 17.



more detail where the proper place of proportionality in the judicial application of human rights provisions can be located.

Proportionality analysis is a judicial methodology to assess the legitimacy of state interference with individual rights. The two-tiered judicial test of whether or not a restriction of civil liberties is suitable and necessary for a specific public purpose is a nineteenth-century invention of the Prussian Higher Administrative Court (Oberverwaltungsgericht) and has, since the Second World War, been reworked by the German Constitutional Court.<sup>44</sup> The Court introduced the notion of judicial balancing of constitutionally protected interests (*Güterabwägung*) as the third step of proportionality reasoning. Konrad Hesse, a pupil of the renowned Weimar public law scholar Rudolf Smend in the 1960s propagated an additional function of the new proportionality analysis, according to which the new form of proportionality reasoning should generally work towards harmoniously accommodating colliding constitutionally protected interests (*Praktische Konkordanz*),<sup>45</sup> a concept which later was adopted by the German Constitutional Court and by Robert Alexy's theory of rights.<sup>46</sup> In the German context, the extended version of proportionality analysis was allegedly used to judicially preserve the unity of the constitution (*Einheit der Verfassung*) as a coherent 'system of values' binding upon the German legislator.<sup>47</sup> It initially justified progressive judgments in an effort to teach Germans the value of societal spheres of freedom and individual autonomy<sup>48</sup> but every now and then would also be used to further conservative judicial projects against a progressive legislator. The extended proportionality analysis has been exported to many domestic jurisdictions and into international human rights law.<sup>49</sup>

Proportionality tests in human rights adjudication come in various forms and structures. Generally, two models can be differentiated. The first one is the classic two stages model (model no 1) of the means–end comparison: after having ascertained the legitimate purpose of the law, the court first asks whether the imposed restriction is a suitable means of furthering this purpose. In a second step, the court ascertains whether the restriction was necessary to achieve the desired end. At this second stage of the test, the reasoning focuses on the question whether a less intrusive means existed to achieve the end (minimal impairment).<sup>50</sup> By contrast, model no 2 adds a third step to the test, namely the ad hoc balancing stage, which is used to weigh the seriousness of the infringement against the importance and urgency of the factors that justify it. Courts which make use of the third step extensively tend to decide cases at this balancing stage. As in the case of the German Constitutional Court, the first two steps in practice tend to be

<sup>44</sup> *Lüth* [1958] BVerfGE 7, 198 (Germany); On the development of the proportionality doctrine in 19th-century German jurisprudence: Barbara Remmert, *Verfassungs- und verwaltungsrechtsgeschichtliche Grundlagen des Übermaßverbots* (Heidelberg, Müller, 1995).

<sup>45</sup> Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 1st edn (Karlsruhe, Müller, 1967) 29.

<sup>46</sup> See above.

<sup>47</sup> Konrad Hesse (n 45 above) 29.

<sup>48</sup> On the historic situation of the new institution in the 1950s see the contributions of Schönberger and Möllers in Matthias Jestaedt, Oliver Lepsius, Christoph Möllers and Christoph Schönberger, *Das entgrenzte Gericht. Eine kritische Bilanz nach 60 Jahren Bundesverfassungsgericht* (Berlin, Suhrkamp, 2011).

<sup>49</sup> See below.

<sup>50</sup> On the necessity stage of the proportionality analysis with a new approach see David Bilchitz, 'Exploring the Necessity Enquiry in the Limitation of Fundamental Rights', [chapter three](#) in this volume; Grimm (n 8 above), 390–93.

less important and less elaborate in their application than the last balancing stage. For these courts justice is supposed to be done at the third stage.

By way of contrast, courts which apply only the classic two-tiered test (model no 1) tend to put more emphasis on the question whether or not an infringement of a particular right was necessary to achieve the legitimate goal. They often require the government or the legislature to prove that the restriction was a reaction to a ‘pressing’, ‘substantial’ or ‘immediate’ concern.<sup>51</sup> In order to operationalise the first step of the test, courts for instance work with specific thresholds for limitations as sub-tests, a famous example being the *Brandenburg* Test of the US Supreme Court in the field of freedom of speech. Only when the conduct of the rights-holder has endangered public security in a qualified fashion as prescribed by the threshold, can the limitation of his freedom be at all justified. The German Constitutional Court recently has started to work more openly with such intervention-thresholds in order to react to mounting criticism of its extensive use of the balancing stage in its proportionality reasoning.<sup>52</sup> Model no 1 is by no means a uniform way of reasoning. As a general observation, it may however be added, that courts not using the last balancing stage seem to be more inclined to refer in their reasoning to the structure and the wording of the respective human rights provisions and their limitation clauses. They tend to develop sub-tests and other bright-line rules for specific groups of cases on the basis of the particular wording of the human rights provision. By contrast, courts that favour ad hoc balancing as the decisive element of human rights adjudication have a tendency to free themselves from the ‘formalist’ burden to work with the text or the applicable norms and their individual limitation or exception clauses. They pretend to have found a universal technique to decide every human rights case irrespective of its textual basis in a ‘rational’ fashion. Model no 1 thus is generally conducive to a more categorical or rule-oriented style of reasoning, whereas model no 2 mainly features ad hoc balancing as a form of general practical reasoning.

Among the courts examined in this Part of the book, the European Court of Human Rights is a prominent representative of the three-step approach with heavy reliance on ad hoc balancing. Moreover, its jurisprudence can serve as an example of the tendency of the balancing-approach to devour the first two stages of the proportionality test, which in most of its current judgments play a marginalised role at best.<sup>53</sup> The German Constitutional Court, too, belongs to the group of courts that predominantly make use of the (model no 2) three stages test with a strong focus on balancing in the last step. However, it explicitly refrains from ad hoc balancing whenever particularly intensive violations are at stake by referring to the human dignity clause in Article 1 of the German Basic Law.<sup>54</sup> The underlying assumption is that many if not all basic rights possess a dignity-related irreducible core or substance, and that infringements of these essential

<sup>51</sup> On the burden of proof problems involved cf Bilchitz, ‘Exploring the Necessity in the Limitation of Fundamental Rights’, [chapter three](#) in this volume.

<sup>52</sup> The *Wunsiedel* case can serve as an example: *Rudolf Heß Gedenkfeier* [2009] BVerfGE 124, 300, 333 (Germany), on this case see below under B.(i).

<sup>53</sup> An important early judgment for this move to balancing was *Handyside v United Kingdom*, Series A no 24 (1976) 1 EHRR 737, para 48 (ECtHR).

<sup>54</sup> Famous judgments are *Lebenslange Freiheitsstrafe* [1977] BVerfGE, 45, 187 (Germany); *Luftsicherheitsgesetz* [2005] BVerfGE 115, 118 (Germany); see also Jochen von Bernstorff, ‘Pflichtenkollision und Menschenwürdegarantie. Zum Vorrang staatlicher Achtungspflichten im Normbereich von Art. 1 GG’ (2008) 47 *Der Staat* 22. On human dignity from a comparative perspective, cf Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 *European Journal of International Law* 655.

individual spheres of freedom can in no case be justified. The categorical style of reasoning in these cases can be seen as a judicial recognition of an anti-utilitarian *telos* of human rights, which is considered incompatible with a methodology of weighing up dignity-related spheres of individual freedom against public interests.<sup>55</sup> This categorical tradition in the jurisprudence of the German Constitutional Court is often overlooked or deliberately downplayed in the literature.<sup>56</sup>

The Canadian Supreme Court tends to put greater emphasis on the first two stages of the proportionality test, and even though the *Oakes* test does foresee a third (ad hoc balancing) step of proportionality reasoning, many judgments display a strong focus on the first two steps of the test.<sup>57</sup> This holds true to an even greater extent for the UN Human Rights Committee. In its jurisprudence the terms ‘balancing’ and ‘weighing’ are practically nonexistent and cases are decided in the first two stages of the proportionality test, partially with the help of intervention thresholds.<sup>58</sup> When restrictions are found to be necessary to achieve a legitimate public purpose in the first two steps of the test, the Committee is likely to declare them to be in conformity with the Covenant. If state interference is considered necessary to achieve a legitimate purpose in the first two steps of the test but at the same time is found to be too intrusive, instead of weighing the conflicting interests at stake, the Committee might directly hold the measure to be a violation of (the ‘essence’) of a Covenant right due to its severe effects on the right-holder.<sup>59</sup> In contrast to the dignity-related jurisprudence of the German Constitutional Court, however, the Committee draws these categorical bright-line limitations without reference to the dignity term. Both approaches have in common that they ultimately decide the case at hand in exclusively assessing the intensive effects of the interference on the individual, without explicitly ‘weighing’ colliding public interests against them. Due to the particular intensity of the violation, the judicial reasoning after the first two stages takes what can be called an *empathetic turn* by, from now on, blinding out the public interests involved. Hereby judicial reasoning respects the anti-utilitarian *telos* of the essence of each individual human right.

What conclusions can be drawn from this short comparative overview over different uses of the proportionality test? My phenomenological point is that human rights reasoning can include both more categorical forms of reasoning on the one hand and ad hoc balancing elements on the other. Categorical forms of reasoning often appear in the

<sup>55</sup> Jürgen Habermas, ‘Das Konzept der Menschenwürde und die realistische Utopie der Menschenrechte’ in Habermas, *Zur Verfassung Europas. Ein Essay* (Berlin, Suhrkamp, 2011) 13–38.

<sup>56</sup> Robert Alexy interprets this tradition as a hidden balancing exercise and thus likens this practice to the ad hoc – balancing methodology: Alexy, *Theorie der Grundrechte* (Frankfurt aM, Suhrkamp, 2001) 96; on Alexy’s reading of the Art 1 jurisprudence of the Court, see Kai Möller, ‘Balancing and the Structure of Rights’ (2007) 5 JCON 453, 465–67.

<sup>57</sup> Grimm (n 8 above) 394.

<sup>58</sup> A good example is *Keun-Tae Kim v Republic of Korea*, Communication No 574/1994 (4 January 1999), para 12.3 (UN Human Rights Committee).

<sup>59</sup> UN-Human Rights Committee, *General Comment No 10: ‘Freedom of expression’*, 29 June 1983, UN-Doc HRI/GEN/1/Rev.6, S 132, para 4; *General Comment No 22: The right to freedom of thought, conscience and religion*, 30 July 1993, UN-Doc CCPR/C/21/Rev.1/Add.4, Ziff 8, 11; *General Comment No 27: ‘Freedom of movement’*, 2 November 1999, UN-Doc CCPR/C/21/Rev.1/Add.9, para 13; *General Comment No 31: ‘Nature of the General Legal Obligation Imposed on States Parties to the Covenant’*, 26 May 2004, UN-Doc. CCPR/C/21/Rev.1/Add.13, para 6; *General Comment No 32: ‘Right to equality before courts and tribunals and to a fair trial’*, 23 August 2007, UN-Doc CCPR/C/GC/32, para 18; explicitly in *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea*, Communication No 1321/2004 und 1322/2004 (2006), para 8.2 (UN Human Rights Committee).

form of bright-line rules with semantic references to human dignity or the ‘essence’, ‘core’ or ‘substance’ of a particular right. Bright-line rules also come in the form of intervention-thresholds, such as the *Brandenburg* test of the US Supreme Court, which in the case of the German Constitutional Court are being applied at the first stage of the proportionality test. Human rights jurisprudence is often a mixture of both elements, adjudicative cultures with a tendency to decide cases on the basis of categorical arguments can theoretically be differentiated from those which focus their reasoning on the third tier of the proportionality test, the ad hoc balancing stage. Different courts can thus be placed on a sliding scale between two opposite poles of judicial reasoning: the categorical one and the ad hoc balancing one.

## B. Testing ‘Categorical’ Alternatives

Let me now turn to some of the cases which have been selected for the discussion in this chapter to test my two basic critical contentions with regard to ad hoc balancing, namely the failure of the ad hoc balancing methodology (model 2) to protect citizens in a reliable and predictable fashion against intensive infringements of individual liberties, and its tendency to intervene in acts of collective self-determination in a methodologically unrestrained fashion. Moreover, I want to give an answer to the question of whether or not there are convincing alternatives to judicial ad hoc balancing for deciding the individual cases selected for discussion.

### (i) *Tennessee v Garner, US Supreme Court (1985): Restricting Deadly Force against Non-dangerous Felonies through Balancing?*

A scenario structurally similar to the following is often referred to by those scholars who defend ad hoc balancing in human rights adjudication.<sup>60</sup> According to a Tennessee statute in force in 1985, a police officer ‘may use all the necessary means to effect the arrest’ after he has given notice of an intent to arrest a criminal suspect if the suspect flees or forcibly resists. A Memphis police officer had shot and killed a young man who, after being told to halt, fled over the fence of a house he was suspected of burgling. The officer had used deadly force despite being ‘reasonably sure’ the suspect was unarmed. The US Supreme Court held that the Tennessee statute violated the Fourth Amendment and was

unconstitutional insofar as it authorizes the use of deadly force against, as in this case, an apparently unarmed, nondangerous fleeing suspect; such force may not be used unless necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.<sup>61</sup>

The use of deadly force in this situation can be viewed as both suitable and necessary to defend a legitimate public purpose, namely the protection of private property – hence the alleged need to have a third tier in proportionality reasoning to correct the outcome of the case, which would otherwise allow the killing of non-dangerous persons for the sake of the protection of property. Grimm, for instance holds that the obviously disproportionate use of deadly force in these cases can only be corrected by inserting an ad hoc

<sup>60</sup> Grimm (n 8 above), 396.

<sup>61</sup> *Tennessee v Garner*, 471 US 1, 2 (1985) (United States).

balancing element in human rights adjudication.<sup>62</sup> At first sight this appears to be a compelling argument in favour of judicial ad hoc balancing. Intuitively most scholars would agree that the deliberate killing of a fleeing non-dangerous misdemeanor by law enforcement personnel is problematic.

But do we really need a judicial methodology of ad hoc balancing as a third step of proportionality reasoning to be able to come to that conclusion and to justify it judicially? Not surprisingly, my contention is that this is not the case. What, in my view, would be a viable methodological alternative in these cases – and what the US Supreme Court arguably attempted to do in *Garner v Tennessee* – is to develop a test for the legality of the use of deadly force through *definitional* or *principled* balancing. These forms of balancing are a particular way of justifying the establishment of a new bright-line rule for a specific scenario, which can be applied in similar cases in the future.<sup>63</sup> *Definitional* balancing is used to define the scope of a particular right whereas *principled* balancing<sup>64</sup> justifies why, with respect to a specific scenario, the court comes to the conclusion that the infringement of the right can be found legal or illegal. Unlike ad hoc balancing, both forms of reasoning are meant to concretise human rights entitlements beyond the individual case at hand.

The content of such a judicially constructed rule in our scenario would be that the killing of a felon is prohibited, unless it is the only available means to safeguard innocent life being immediately threatened by the acts of the felony. According to such a judicially established concretisation of the right to life you can use deadly force against the hostage-taker who is about to kill the hostage but you cannot legally shoot the boy who is running away with a stolen apple. Even though the judges in *Garner v Tennessee* might have arrived at this conclusion by a mental or express process of ‘weighing’ the potential interests at stake, the decisive difference between the two styles of reasoning (*definitional* or *principled* versus ad hoc balancing) is whether or not the court hereby establishes a concretised limit of infringements applicable to similar cases.

Such rule-like concretisations of rights for comparable scenarios – once developed in an exemplary case – would be applied in combination with a two-tiered proportionality test (suitability and necessity). Doctrinally, they can take various forms and, for example, be referred to as an irreducible core of a human right, or an intervention-threshold (*Eingriffsschwelle*). *Definitional* balancing is one particular option to justify such rule-like concretisations of human rights, which can then be applied to other cases, whereas in a judicial culture of ad hoc balancing each new case would be judged predominantly on the basis of its concrete circumstances. Categorical jurisprudence thus increases the predictability of human rights jurisprudence and in the situation at hand has the potential to safeguard the right to life of perpetrators of misdemeanours in law enforcement situations beyond the respective case. Such categorical forms of reasoning are less flexible than ad hoc balancing but at the same time increase legal certainty and provide orientation for the legislature as to the limits on public infringements of civil liberties. By upholding the assumption that there can be future (‘like’) cases to which the same reasoning will apply, categorical forms of reasoning also foster a judicial culture of distinguishing and overruling. This in itself is a welcome methodological contribution to the

<sup>62</sup> Grimm (n 8 above), 396.

<sup>63</sup> A famous example for *definitional* balancing is US Supreme Court’s judgment in *New York v Ferber*, 458 US 747, 747, 763–64 (1982) (United States).

<sup>64</sup> Barak (n 8 above) 12.

ideal of legal certainty and predictability in both common law and civil law systems by providing a firmer argumentative ground for human rights adjudication.

A recent example of such a form of categorical reasoning in the jurisprudence of the German Constitutional Court is the *Wunsiedel* decision.<sup>65</sup> In this case, the German Constitutional Court developed a test for permissible limitations of the freedom of speech guarantee in the German Constitution. It held that restrictions upon the freedom of political speech were considered unconstitutional as long as the public measure at hand did not pass an initial threshold requirement (*Eingriffsschwelle*) to be applied at the beginning of the proportionality test. According to the test, which to a certain extent resembles the *Brandenburg* test of the US Supreme Court, limitations can only be legal as a reaction to a speech-related 'concrete danger' to other protected interests in the particular situation at hand.<sup>66</sup> This test can be applied without ad hoc balancing and leads to an absolute protection of free speech in all cases in which the intervention threshold ('concrete danger to legally protected interests') is not reached.

(ii) *Boujlifa v France*, ECtHR (1997): *Protecting Second-Generation Migrants from Deportation through Judicial Balancing?*

The following cases can serve as an illustration of the inherent limitations of the ad hoc balancing methodology, leading to a situation where the judiciary fails to erect meaningful minimum standards of human rights protection. In the two leading cases *Boujlifa v France* and *Üner v The Netherlands*, the European Court of Human Rights had to decide whether or not so-called 'second-generation migrants', who had grown up and lived in France and the Netherlands practically all their lives, could be deported to their country of origin after having served a prison sentence. In *Boujlifa*, the Court argued that the deportation was interfering with the right to privacy and family life enshrined in Article 8 of the Convention, but could be justified by the Member State's interest in protecting public order. In an attempt to rationalise its preferred ad hoc balancing methodology, the Court introduced various criteria, such as the seriousness of the offence committed, the existing personal ties to the country of origin of the applicant and his command of the language in the country to which he had been deported. Judges Van Dijk and Baka in their dissent harshly criticised the way in which the Court applied these criteria in the ad hoc balancing act:

The Court has been divided on the issue of the deportation of 'second generation' immigrants for quite some time. This 'reality of life' becomes rather problematical when the application of the proportionality test leads to different outcomes in cases in which the factors to be weighed would not seem to differ in any essential respect. It would therefore seem to be highly desirable that the Court should abandon its casuistic approach.<sup>67</sup>

The dissent points to the fact that the insertion of relevant criteria into the ad hoc balancing process is not sufficient to create a predictable jurisprudence on the issue of the deportation of second-generation migrants. In *Üner v The Netherlands* the Court reacted to the harsh criticism and attempted to further elaborate the criteria introduced in *Boujlifa*:

<sup>65</sup> Rudolf Heß Gedenkfeier [2009] BVerfGE 124, 300, 333 (Germany).

<sup>66</sup> *Brandenburg v Ohio*, 395 US 444, 447 (1969) (United States).

<sup>67</sup> *Boujlifa v France* (App No 25404/94) [1997] ECHR 1997-VI, 30 EHRR 419, joint dissenting opinion of judges Baka and Van Dijk (ECtHR).



Even if Article 8 of the Convention does not therefore contain an absolute right for any category of alien not to be expelled, the Court's case-law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of that provision.<sup>68</sup>

In *Üner* the Court expanded the list of criteria to be taken into account in these cases, including the nature of the offence and the specific family situation of the migrant. Again, the judgment was harshly criticised by a dissent which came to the opposite conclusion, namely that the deportation in the *Üner* case had indeed violated Article 8. In the view of the dissent, the majority opinion had accorded too much weight to some of the criteria relating to the public interest at stake while attributing insufficient weight to others relating to the intensity of the infringements from the perspective of the applicant.<sup>69</sup> What becomes clear in the two cases is that the introduction of criteria on both sides of the ad hoc balancing equation does not as such help to establish a predictable jurisprudence for specific situations. It is telling that – while applying exactly the same criteria – the dissent comes to the opposite conclusion as the majority.

Which conclusions can be drawn from the *Boujlifa* and *Üner* decisions for the predictability of human rights adjudication? If the judgments had focused on an assessment of the intensity of the infringement, leaving aside the public interests at stake, the complexity of the issue would have been reduced and the 'essence' of the respective right could have been upheld. It is such a restricted focus on the effects of the measure on the rights-holder that ultimately allows courts to concretise human rights in a rule-like fashion. Even though judges will also have to take the relevant public interests into account, they should have the courage to draw a line between harmless and particularly severe limitations of individual freedoms and thereby communicate where the boundary between tolerable and unacceptable infringements lies and will consequently also be drawn in future cases.

Such judicially constructed boundaries are relatively stable communicative structures which will not automatically be affected by changing public interests and their particular 'weight'. They have to be developed *ex negativo* by assessing the intensity of the infringement and would in the situation at hand be applied irrespective of the question whether the migrant has committed a serious crime or only a less serious offence. To be even more specific, the result of such a categorical process of reasoning in the case of the deportation of second-generation migrants could be the following judicially constructed concretisation of Article 8 ECHR: the deportation of a second-generation migrant, who has spent most of his life in one of the Member States and has close social ties (family) in that Member State is a violation of (the essence) of Article 8 and therefore is prohibited under the Convention. Such a categorical ruling could for instance be justified with the additional arguments raised by the dissent in *Üner*, according to which deportation in these cases is a particularly severe and thus intolerable infringement since it involves an additional element of discrimination against second-generation migrants. For, compared to criminals without migration background they would face double punishment: their regular (prison) sentence plus the permanent separation from their home through the subsequent deportation.

<sup>68</sup> *Üner v The Netherlands* (App no 46410/99) [2006] ECHR 2006-XII, 45 EHRR 14, para 57 (ECtHR (GC)).

<sup>69</sup> *Üner v The Netherlands* (n 68 above), joint dissenting opinion of judges Costa, Zupan i and Türmen.

(iii) *The State v Henry Williams and Others (1995): Prohibiting Violations of Human Dignity through Judicial Balancing?*

In my discussion of this famous South African case I want to show the advantages of replacing a three-tiered proportionality analysis with the classic two stages test (suitability and necessity) combined with judicial bright-line limitations when it comes to particularly intensive infringements of individual liberties. It was through this case that the Constitutional Court of South Africa abolished juvenile whipping by declaring the respective provision of the South African Criminal Procedure Act to be in violation of the following two provisions of the South African Interim Constitution of 1993: 'Every person shall have the right to respect for and protection of his or her dignity' (Section 10), and: 'No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment' (Section 11(2)). According to the interpretation of the South African Constitutional Court both provisions were subject to the limitation clause in Article 33 of the 1993 Constitution, which stipulated that limitations shall only be permissible to the extent that they were 'reasonable', 'justifiable in an open and democratic society based on freedom and equality', and 'necessary'.

Even though the judgment initially refers to a process 'of weighing up competing values'<sup>70</sup> and contains balancing language, it is primarily based on two categorical arguments. The Court's first argument is that juvenile whipping is an intensive violation of human dignity of the juvenile. Whipping subjects 'juveniles to punishment that is cruel, inhuman or degrading'.<sup>71</sup> It is absolutely prohibited as a means of punishment in most Western countries.<sup>72</sup> And a couple of pages later it describes the infliction of pain as a punishment as a 'practice which debases everyone involved in it'.<sup>73</sup> It is hard to imagine that a court which assesses the public measure at stake in such terms would in the same judgment come to the conclusion that it can be justified by a compelling public purpose. Through an empathetic assessment of the intensity of the violation alone these cases can be – and arguably should have been – decided. The vague balancing language employed at a later stage of the judgment does not seem to add anything substantial to justify the outcome. Once the intensity of the infringement of human dignity has been depicted as intolerable, it is clear that corporal punishment is unconstitutional.

The second decisive categorical argument in the reasoning of the Court is the necessity test. Without recourse to balancing, the Court finds that less invasive forms of punishment exist, which could be equally effective for the purpose of deterring and preventing juvenile crime. At least, state authorities had failed to demonstrate that all alternative ways of punishment would be less effective deterrents: 'No clear evidence has been advanced that juvenile whipping is a more effective deterrent than other available forms of punishment'.<sup>74</sup>

State authorities had, however, argued that the imposition of alternative forms of punishment would require a sufficiently well-established physical and human resource base which was still lacking in South Africa. Hence, at the time being no alternative

<sup>70</sup> *The State v Henry Williams and Others*, Case No CCT/20/94, 1995 (3) SA 632, para 60 (South Africa).

<sup>71</sup> *ibid*, para 63.

<sup>72</sup> *ibid*, paras 23–39.

<sup>73</sup> *ibid*, para 89.

<sup>74</sup> *ibid*, para 80.



ways of punishment were available. Again, the Court countered with the (categorical) intensity-argument:

The proposition is untenable. It is diametrically opposed to the values that fuel our progress towards being a more humane and caring society. It would be a negation of those values precisely where we should be laying a strong foundation for them, in the young; the future custodians of this fledgling democracy.<sup>75</sup>

It is precisely through its categorical elements that the judgment grows into a predictable judicial concretisation of essential human rights entitlements. Juvenile whipping is unnecessary in the first place; even if it were necessary as a punishment it would be unconstitutional because it ‘debases’ both those who inflict it and those who are the victims of such a form of punishment. It thus infringes the essence of the right to psychological integrity and the human dignity of the juvenile. It is these two categorical arguments that carry the reasoning. Where balancing language is employed in the judgment, it primarily seems to confirm the prior reasoning of the Court:

It cannot be reasonable and in keeping with these values to imply, through the punishments we impose, that the infliction of violence is an acceptable option in the solution of problems. In any event, this consideration falls far short of the justification required to entitle the State to override the prohibition against the infliction of cruel, inhuman or degrading punishment. Its implications for the dignity of the individual are also far too serious.<sup>76</sup>

My contention is that the employed balancing language is not needed to justify the Court’s conclusion. The reasoning concretises a prohibition of juvenile whipping which can be based on the necessity test and a bright-line prohibition of degrading corporal punishment because of their intrusive effects on psychological integrity or human dignity alone. But the employed balancing language is not only unnecessary; it is also detrimental from the perspective of the rights-holders. For, whenever particularly severe infringements of human rights or human dignity are at stake, it seems odd to imply in the judgment that theoretically compelling public interests may exist, which could in a subsequent case justify juvenile whipping. But that is precisely what balancing language does. Instead of a rule-like concretisation for comparable cases, it *qua* methodology implies that next time the scales might just as easily come down on the other side. The judicial balancing act is semantically dressed up as being highly context-sensitive. Once juveniles start to commit *very* serious crimes and other means of deterrence and correction have proved unsuccessful, the Court might find otherwise. In a culture of ad hoc balancing there are no argumentative burdens, matters can be weighed differently next time – it is all up to the circumstances of each individual case. And it is *the courts* that then will be free again (*qua* methodology) to justify whipping this time around. Taken to an extreme, this means that there is no law in human rights adjudication at all. Without methodological constraints to treat like cases alike the deontic character of law vanishes.

<sup>75</sup> *ibid*, para 63.

<sup>76</sup> *ibid*, para 79.

(iv) *Alberta v Hutterian Brethren of Wilson Colony (2009): Confirming Road Safety Legislation through Judicial Balancing?*

In the discussion of this last prototypical balancing case, I would like to come back to my second main contention, according to which judicial ad hoc balancing is potentially detrimental to collective self-determination in a democratic society. In this case the Canadian Province of Alberta required driver's licences to bear a photograph of the licence holder taken at the time of issuance of the licence. The relevant road safety legislation of 2003 did not allow any exemption for people who objected on religious grounds to having their photographs taken. The Wilson Colony of Hutterian Brethren maintained a traditional rural lifestyle and its members believed that the Second Commandment prohibits them from having their photographs willingly taken. The claimants held that the legislation violated their rights to freedom of religion and non-discrimination enshrined in the Canadian Charter of Rights.

How did the Supreme Court deal with the case? The Court employed a three-tiered proportionality test, including an ad hoc balancing stage (see above model No 2). In the eyes of the Court, the photo requirement passed the first two stages of the test: it is a suitable means of improving road safety by creating possibility of facial recognition of licence holders; and it is also necessary to minimise the risks for road safety caused by identity theft because the evidence showed, in the view of the majority opinion, that there were no alternative measures which would satisfy the government's objective while allowing the claimants to avoid being photographed. It was at the controversial third stage of the proportionality analysis where the Court set out to eventually decide the case, thereby explicitly referring to the methodology of the Israeli Supreme Court:

[T]he first two elements of the proportionality test – rational connection and minimum impairment – are satisfied, and the matter stands to be resolved on whether the 'deleterious effects of a measure on individuals and groups' outweigh the public benefit that may be gained from the measure.<sup>77</sup>

The Court proceeded with the balancing exercise in three steps. It assessed the 'salutary effects' associated with the legislative goal (1) followed by an assessment of its 'deleterious effects' (2) 'Weighing' of salutary and deleterious effects then constitutes the last and third part of the balancing act (3). Already at the first 'salutary effects' stage, it becomes evident how deep ad hoc balancing potentially intervenes in collective self-determination through democratically-elected representatives. It is the Court that now can put itself in the position of the Albertan Parliament by freely assessing the value of the legislative goals pursued. In the view of the Court 'mandatory photos represent a significant gain to the integrity and usefulness to the computer comparison system'.<sup>78</sup> The majority opinion thus, in this case, confirms the assessment of the legislator, and in the balancing act the scales ultimately come down on the side of the public interest. But as is demonstrated by the dissent, the Court could just as well have come to the opposite conclusion by finding that the gain in road safety is only a marginal one, that absolute security can never be achieved anyway and that freedom of religion 'weighs' heavier than a minor and rather remote potential rise of security on Albertan roads.<sup>79</sup>

<sup>77</sup> *Alberta v Hutterian Bethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567, paras 76–78 (Canada).

<sup>78</sup> *ibid*, para 80.

<sup>79</sup> *ibid*, paras 200–201.

What is important to point out here is the difference between the limited test at the suitability and necessity stages and the potentially unrestrained ‘weighing’ of salutary effects at the final stage. The suitability test as applied at the beginning of the three-pronged proportionality test only asks if the legislative measure is a suitable means of achieving a legitimate goal. The question of how important the legislative goal is for society is left to the parliament. Its prior political decision to pursue this particular goal is thus being respected. Only if the goal is on the face of it illegitimate or not rationally connected to the measure applied, can it be challenged at the initial suitability and necessity tests. Granted, in this exercise judges do need to make a normative assessment of the measure at hand.<sup>80</sup> My point is, however, that these tests are structurally confined to an evaluation of the means–end relationship. Their structure necessitates some deference vis à vis prior political decisions taken by the parliament, while the ‘weighing’ of salutary effects at the balancing stage *qua* methodology unlocks the possibility to replace a political assessment of the parliament with a contrasting political assessment of the court. In *Alberta v Hutterian Brethren of Wilson Colony* the Canadian Supreme Court does not use this possibility, even though it could at the ad hoc balancing stage just as easily have gone down that road.

Hence, cases like this one, which do not involve severe infringements of individual liberties, should generally be resolved at the first two stages of proportionality reasoning. It is the task of the parliament to politically define limitations of rights for the pursuance of legitimate public goals. Once a court comes to the conclusion that the measure and ends are rationally connected and no severe limitation of individual liberties is at stake, it should show a high degree of deference vis à vis parliamentary legislation in order to avoid the counter-majoritarian catch. Ad hoc balancing, unlike suitability and necessity tests, undermines such deference. Only if the very essence of a particular right is at stake, should the court explicitly assess the intensity of the violation in a third prong of the proportionality test in categorical terms through judicial bright-line limitations, that is without ad hoc weighing of private and public interests (see above on the juvenile whipping case).

In practical terms this means that at the third stage of proportionality reasoning the practice of both making an independent judicial assessment of ‘salutary effects’ as well as ‘weighing’ salutary and deleterious effects against one another should be abandoned, whereas an assessment of deleterious effects may sometimes be needed to justify a judicial bright-line limitation to exclude particularly severe legislative infringements of individual liberties in specific groups of cases (a so-called ‘emphatic turn’). In the case at hand, the Canadian Supreme Court should have confirmed the legislation after having concisely assessed the suitability and necessity of the measure by referring to the constitutional prerogative of the Albertan Parliament to concretise non-intensive limitations of individual rights in the pursuance of politically agreed public goals through formalised legislative procedures.

<sup>80</sup> On the German debate on the first two prongs of the proportionality analysis and their alleged normative baggage, cf. Schlink (n 7 above) 445 ff; Bilchitz, ‘Exploring the Necessity enquiry in the limitation of fundamental rights’, [chapter three](#) in this volume.

## IV. COMING CLEAN: PROPORTIONALITY WITHOUT AD HOC BALANCING

In the foregoing Section, I have attempted to demonstrate that in the four cases which were selected for discussion in this chapter of the volume, judicial recourse to ad hoc balancing methodology was either unnecessary or even detrimental to the realisation of individual and collective self-determination. Abstinence from ad hoc balancing in the reasoning of the respective courts would either have helped to clarify absolute limitations on restrictions of individual liberties for specific recurring situations (cases 1, 2 and 3) or facilitated judicial deference vis à vis political decisions of democratically-elected institutions (case 4). In general terms, abstinence from ad hoc balancing creates a space for additional forms of judicial argumentation alongside the first two classic prongs of the proportionality test. Inspired by a term used in the classic debate on constitutional review in US scholarship, I termed this kind of judicial reasoning ‘categorical’, in order to highlight the contrast with those forms of judicial reasoning that rely on ad hoc balancing.

My intention was to show that methodologically the first two tiers of the proportionality test can be included in the categorical camp because of their restricted scope and their abstinence from unrestrained ‘weighing’ of interests and values. David Bilchitz in this volume convincingly argues that an attractive version of the necessity test requires courts to engage in ‘substantive and normative’ reasoning and develops a more sophisticated approach to the necessity test which reflects this insight. At the same time he agrees that the balancing enquiry that takes place at this second tier of the proportionality analysis is a limited one and should be clearly distinguished from what I call ad hoc balancing on the contested third tier of proportionality testing.<sup>81</sup>

Furthermore, I defended the necessity of an intensified use of judicially established bright-line rules for specific groups of cases where particularly intensive interferences are at stake. Such judicially established limitations can be created by specific tests (intervention-thresholds) or definitional balancing, or appear in forms of explicit judicial references to the ‘core’, ‘substance’ or ‘essence’ of a particular right.

But how can the ‘essence’ or ‘core’ of a particular right be legally determined under conditions of postmodern societal contingency? Is there something like an ontological substance of each human right to be discovered by judges and constitutional scholars? Probably not. In the absence of a static and uncontested conception of the good life it will be very difficult to identify a universally shared quasi-ontological notion of minimum guarantees under particular human rights entitlements. But this should not hinder judges in concretising minimum standards *ex negativo* in view of particularly intensive infringements through judicial review. The judicially constructed ‘essence’ of the ‘core’ of a particular right is a creative interpretative act for specific scenarios, which indeed cannot rely on an uncontested objective theory of values. In practice it will thus often mean deciding ‘the undecidable’, as both Derrida and Luhmann once described the paradoxical nature

<sup>81</sup> David Bilchitz, ‘Exploring the Necessity Enquiry in the Limitation of Fundamental Rights’ in [chapter three](#) of this volume; Paul Yowell also aptly points to the need of normative judgments at the second tier but in my view less convincingly draws the conclusion that there is a complete ‘conflation’ of the second and third tier in the jurisprudence of the Canadian Constitutional Court; see his ‘Proportionality in US Constitutional Law’ in [chapter five](#) of this volume.

of judicial decision-making.<sup>82</sup> Categorical forms of reasoning have a lot in common with ad hoc balancing. The only decisive difference is that the categorical judgment changes the communicative fabric of human rights law in a reliable and accountable fashion. It aspires *qua* methodology to serve as judicial yardstick for further cases, whereas ad hoc balancing does not.

My plea for a more categorical style of human rights adjudication does not include styles of reasoning which are being subsumed under the term of ‘originalism’ in US constitutional law.<sup>83</sup> Even though originalism is a form of reasoning which abstains from ad hoc balancing, it must be distinguished from other categorical forms of reasoning. Originalists tend to hide behind an allegedly objective historic authority (the founding fathers) in justifying their bright-line rules. As remarked by many authors, such historic objectivity does not exist, but is a result of an inevitably subjective interpretation of historical texts by the respective judges. In addition, deference to political decisions of democratically-elected bodies does not exactly belong to the typical characteristics of originalist argumentation. Originalism thus stands in the way of a judicial culture in which judges generally show deference vis à vis the legislator. Moreover, originalist reasoning often comes in the form of sweeping and broad interpretations of constitutional norms rather than in the form of prudent concretisation of human rights entitlements for specific case constellations *ex negativo* combined with the first two tiers of proportionality testing, which I have been suggesting as an alternative to ad hoc balancing in the foregoing analysis.

As I have made clear at the beginning of this contribution, the main normative thrust of my argument is inspired by a formalist bias, which values legal certainty, a conception of rights as *legal* rules with an anti-utilitarian *telos* (not ‘principles’) and collective self-determination. And the best way to increase legal certainty in the human rights field is precisely to abstain from judicial ad hoc balancing. Human rights adjudication should thus strive for creating a predictable body of human rights jurisprudence by fostering categorical forms of argumentation. This form of judicial auto-limitation is also conducive to, if not even a prerequisite of, a judicial culture of distinguishing and overruling. Categorical styles of reasoning are often depicted as less transparent and thus less discursive than ad hoc balancing.<sup>84</sup> At first sight the ostentatious judicial ‘weighing’ of specific and conflicting ‘interests’ at stake may indeed seem more discursive; on closer inspection however, the transparency of the ad hoc balancing act resembles the transparency of a wordy speech of the enlightened monarch, who benignly explains to his subjects why he had to decide the case the way he decided it.

A plea for abandoning judicial ad hoc balancing is of course not politically innocent. It can have institutional implications, which would have to be assessed in the various constitutional or treaty settings by taking into account the respective national or international legal and political cultures. For the legal and political contexts in which judicial proportionality reasoning operates are different in every country or

<sup>82</sup> Jacques Derrida, *Gesetzeskraft. Der mythische Grund der Autorität* (Frankfurt aM, Suhrkamp, 1991) 49; Niklas Luhmann, *Das Recht der Gesellschaft* (Frankfurt aM, Suhrkamp, 1993) 317.

<sup>83</sup> See, on the history of US originalism Larry Kramer, ‘Two (more) Problems with Originalism’ (2008) 31 *Harvard Journal of Law & Public Policy* 907 ff.

<sup>84</sup> Matthias Kumm, ‘Fundamental Rights as Principles’ in Augustin J Menéndez and Erik O Eriksen (eds), *Fundamental Rights Through Discourse. On Robert Alexy’s Legal Theory. European and Theoretical Perspectives* (Oslo, Arena, 2004) 201, 232.

region and change over time. Ad hoc balancing for instance can arguably be a viable judicial strategy to break up authoritarian legislation in a post-dictatorial situation, as was the case in Germany after the Second World War. In these situations ad hoc balancing might help to empower judges to slowly transform and constitutionalise a post-authoritarian legal order through human rights adjudication. The German experience also can teach us that what has been a virtue in the 1950s and 60s can become a vice 50 years later. Today, the problematic tendency of the jurisprudence of the German Constitutional Court to stifle collective self-determination is being felt and discussed with an unprecedented critical vigour.<sup>85</sup> Or take the practically infinite flexibility of the European Court of Human Rights' jurisprudence created by the move to ad hoc balancing and the unforeseeable use of the 'margin of appreciation' doctrine.<sup>86</sup> This move might have been a viable approach to establish a new regional court based on international treaty law in a politically difficult and heterogeneous environment. Progressive judicial intervention and deference could both be employed flexibly in view of the respective political situation. In the long run however, doctrinally unlimited flexibility undermines the authority of judicial institutions. For courts need to be conceived and recognised by other actors as *legal* bodies. Arguably this is the situation in which the European Court of Human Rights finds itself today; its failure to develop either a predictable and coherent jurisprudence on intensive violations of the Convention or a coherent doctrine of deference have led to a situation where both Member States and civil society seem to become ever more reluctant to follow and fully support the Court's judgments.

Ad hoc balancing empowers judges by liberating them from methodological constraints and the burden of treating like cases alike. For, such burdens only come with the proposed alternative style of reasoning, namely the creation and application of categorical bright-line rules or judicial tests for specific case constellations. Abstinence from ad hoc balancing thus forces judges to look beyond the individual case at hand and take responsibility for the body of human rights law as a whole, within the parameters of their proper institutional role. In times of political pressure, it would then become easier for courts to withstand expectations from strong external actors regarding the outcome of specific cases, since judges could credibly rely on prior judicially established bright-line rules. These bright-line limitations can only be modified through creating new generalisable exceptions or by creating a new rule, both of which come with relatively high argumentative burdens. Certainly, due to this reduced methodological flexibility, political confrontations with governments can potentially become more intense. This might well be one of the main political reasons why ad hoc balancing appears to have a highly 'addictive' potential for judges across jurisdictions.

The alternative scholarly vision developed in this contribution is a judicial culture of commitment to human rights as legal rules, which generally defers to political decisions of democratically-elected bodies but courageously intervenes in a predictable and rule-like

<sup>85</sup> Jestaedt, Lepsius, Möllers and Schönberger (n 13 above).

<sup>86</sup> On the problematic use of the doctrine of Walter Kälin and Jörg Künzli: 'Today, however, it would seem that the court often invokes this legal approach in particularly controversial areas, sometimes even in cases with strong bearing on core aspects of the right . . . so that it can declare them inadmissible or dismiss them without any real substantive examination', Kälin and Künzli, *The Law of International Human Rights Protection* (Oxford, OUP, 2009) 471; Eva Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1996) 56 *Heidelberg Journal of International Law* 240.

fashion precisely and predominantly in those situations where the stakes are high and the very existence of individual spheres of freedom is under threat. In such a culture of human rights adjudication there would be no place for ad hoc balancing.

# *Proportionality in United States Constitutional Law*

PAUL YOWELL

## I. INTRODUCTION

THERE ARE IMPORTANT differences between methods of constitutional rights adjudication in the United States and the proportionality inquiry used by European courts. The similarities between US methods and the European proportionality inquiry, however, are more fundamental than the differences, and are sufficient to warrant the conclusion that US courts employ a form of proportionality inquiry. Indeed, the US Supreme Court originated the use of proportionality – though not under that name – in constitutional adjudication in the late nineteenth and early twentieth centuries. The seminal case in applying the proportionality method in constitutional adjudication is *Lochner v New York*.<sup>1</sup> This has been obscured by later developments, including the Supreme Court’s adoption of the method of tiered scrutiny, and by a failure to attend to the reasoning and historical background of the *Lochner* decision. An investigation of that historical background and the decisional method in *Lochner*, and of parallel developments in Germany in the same period, will show the similarity of the US and European approaches to rights adjudication and shed light on the nature of the proportionality inquiry itself.

## II. THE EUROPEAN PROPORTIONALITY INQUIRY

The European proportionality inquiry consists in an ensemble of related tests used by courts to probe the justification for, and to assess the reasonableness of, state action – which may be legislation or other kinds of law-making, an executive or administrative decision, or police action. I use ‘measure’ hereafter generally to designate the state action tested. European proportionality analysis originated in Germany and has now been adopted throughout continental Europe, the UK and Ireland; in the European Court of Human Rights and the European Court of Justice; in Latin America and the Inter-American Court of Human Rights; and in many other countries including Canada, Israel and South Africa. Proportionality analysis has been called the ‘the defining doctrinal

<sup>1</sup> *Lochner v New York*, 198 US 45 (1905) (United States).



core of a global, rights-based constitutionalism' by Jud Matthews and Alec Stone Sweet, who argue that the United States is included – though not fully – in the global constitutionalism to which proportionality has given rise.<sup>2</sup>

The basic idea of the proportionality inquiry is that a governmental measure should not place an undue or excessive burden on the exercise of a constitutional right or on individual interests protected by the right; any limitation or burden on individual rights or interests should be proportionate to the end sought to be achieved by the measure in question. Four tests commonly included in the proportionality inquiry are:

1. Legitimacy. Does the measure have a legitimate aim?
2. Rationality (or suitability). Does the measure effectively further the government's end?
3. Necessity (or minimal impairment). Is the measure narrowly framed to achieve the government's end? Is there an alternative measure that would secure the end while imposing a lesser burden on individual rights or interests?
4. Balancing (or proportionality in the strict sense). Does the burden on individual rights or interests outweigh the value of the government's end?

I call this the European proportionality inquiry to indicate the proximate origins of the multi-step approach, but will often refer to the proportionality inquiry in more general terms. In section III, I argue that tests 3 and 4 above are often in practice conflated into a single test of *means-ends proportionality*, and that this is the crux of the proportionality inquiry. Tests 1 and 2, legitimacy and rationality, are frequently dealt with by courts in a cursory fashion and sometimes passed over; government measures very rarely fail these tests.

The European Court of Human Rights and a number of other courts, including the German Federal Constitutional Court and the Canadian Supreme Court, employ a two-stage process of constitutional rights adjudication, in which the first stage determines whether a governmental measure has interfered with a right, and the second stage applies the proportionality inquiry to determine whether the interference with the right is justified. The two-stage process has roots in limitation clauses in existing rights instruments. The European Convention of Human Rights, for example, provides that with respect to freedoms of expression, religion and conscience, association and assembly, and private and family life, the exercise of these rights may be limited only as 'prescribed by law' and as 'necessary in a democratic society' for the realisation of goals such as national security, public safety, health, morals, prevention of public disorder and crime, and protection of the rights and freedoms of others.<sup>3</sup> At the first stage of the process courts sometimes find that a governmental measure does not interfere with a right, and such a judgment has the effect of giving some legal definition to the right in question by identifying limits to its scope. In most cases, however, courts find an interference with a right at the first stage, and the weight of analysis occurs at the second stage of inquiring whether the interference is justified. The language courts employ in this two-stage process varies. Instead of 'interference', some courts say that a govern-

<sup>2</sup> J Mathews and A Stone Sweet, 'All Things in Proportion? American Rights Review and the Problem of Balancing' (2011) 60 *Emory Law Journal* 797, 874.

<sup>3</sup> ECHR articles 9, 10, 11, 12.

ment measure ‘infringes’,<sup>4</sup> ‘restricts’, or ‘limits’ a right, and the inquiry is then into whether such infringement, restriction, or limitation is justified. A variety of other terms are used as well.<sup>5</sup>

The upshot of the two-stage process is that human and constitutional rights do not figure in judicial reasoning as concepts with specific substantive content. Having served to invoke the proportionality inquiry at the first stage, the right largely drops out of the analysis at the second stage.<sup>6</sup> The situation would not be fundamentally different if a jurisdiction were simply to allow individuals to challenge the validity of all governmental measures (or their application in a given case) on the basis of the proportionality inquiry. Such a jurisdiction could then dispense with the first stage in the process, together with the notion of a justified infringement of a right, and indeed with the list of separately identified rights that can be justifiably infringed; all challenges to governmental measures could begin with the justification stage. The effect of such a move could be to increase access to the proportionality inquiry, because occasionally under the two-stage process courts find that a governmental measure does not interfere with a right. The function of human and constitutional rights in this two-stage process is to serve as the gateway to – and gatekeeper for – application of the proportionality inquiry. Matthias Kumm states that constitutional rights should no longer be considered ‘a set of specific and enumerated constraints on political actors’; because they set the stage for the proportionality inquiry, they have become ‘the instrument for the constitutionalization of all legal and political conflicts’.<sup>7</sup>

In the United States courts do not overtly employ the two-stage process of the European proportionality inquiry and do not usually speak in terms of an inquiry into

<sup>4</sup> See, eg, *Sauvé v Canada* [2002] 3 SCR 519, [7] (Canada) (‘To justify the infringement of a Charter right under s 1, the government must show that the infringement achieves a constitutionally valid purpose or objective, and that the chosen means are reasonable and demonstrably justified’ (emphasis added).); *Mayeka v Belgium* (App no 13178/03) (2008) 46 EHRR 23 (ECtHR) (‘The Court reiterates that an infringement of an individual’s right to respect for his or her private and family life will violate Art. 8 unless it is “in accordance with the law”, pursues one or more [legitimate aims] and is “necessary in a democratic society”, in other words, proportionate to the pursued objectives. The question before the Court is whether the interference was justified under para. 2 of Art. 8 of the Convention’ (emphasis added).).

<sup>5</sup> See GCN Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge, CUP, 2009) 118.

<sup>6</sup> David Bilchitz disagrees with this point, arguing that ‘it is crucial for the correct application of proportionality that the courts seek to understand, at the first stage of the enquiry, the substantive content of the right in the particular context and thus the nature of the violation that has taken place’. (‘Necessity and Proportionality: Towards a Balanced Approach’, chapter three of this volume, text to fn 58). This position builds upon the claim made earlier in his chapter that ‘[f]undamental rights are not just any normative consideration: they are particularly strong protections that can only be limited on the basis of a strong justification’ (p 47). Bilchitz’s view of the importance of rights and the significance of a first-stage finding of infringement stands in contrast to that of leading defenders of proportionality who claim that rights do not have special moral weight. Matthias Kumm states that ‘a rights-holder does not have very much in virtue of his having a right’ (‘Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement’ in George Pavlakos (ed), *Law, Rights, and Discourse: The Legal Philosophy of Robert Alexy* (Oxford, Hart Publishing, 2007) 151), and Kai Möller denies that rights have ‘special normative force’ (‘Proportionality and Rights Inflation’ in G Huscroft et al (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge, CUP, 2013)). Kumm, Möller, and others argue that little or nothing of significance is decided by a finding of infringement at the first stage, and a strong justification is not required to overcome a right, only a sufficient one. While I do not endorse their position as a matter of a general philosophy of rights – for a critique of their position see GCN Webber, ‘On the Loss of Rights’ in Huscroft et al (above) – I think that their view tracks the cases and practice of constitutional and human rights courts more accurately than Bilchitz’s on this point.

<sup>7</sup> M Kumm, ‘Who Is Afraid of the Total Constitution?: Constitutional Rights as Principles and the Constitutionalization of Private Law’ (2006) 7 *German Law Journal* 341, 344–45.

whether the interference or infringement of a right may be justified. This, along with the lack of limitation clauses in the US Bill of Rights, may lead one to conclude that the US courts take a more categorical or definitional approach to constitutional rights that seeks to delineate their content. There are some cases in which the US Supreme Court has categorically delineated the scope of a right; a well-known example is the doctrine that the First Amendment does not protect obscenity.<sup>8</sup> This doctrine is structurally equivalent to holding at the first stage of the European proportionality inquiry that a law proscribing obscenity does not interfere with the right to freedom of expression. But the vast majority of US cases on constitutional rights are resolved by a method whose underlying structure resembles the second stage of the European proportionality inquiry. The method is based on the postulate that the right in question is not absolute, and it turns on the question of whether the government measure effectively promotes an end that is important enough to justify limiting the right. The method is usually applied through the system of tiered scrutiny developed by the Supreme Court over the middle decades of the twentieth century, which matches categories of rights or interest to particular levels of state aims (eg, ‘compelling’, ‘important’) and specified relationships between means and ends needed to sustain the limitation on rights. The system of tiered scrutiny, which will be considered in detail in section IV below, usually has the effect of concealing the two-stage process and the structure of justified infringement of rights, and it often dispenses with the need to speak in terms of balancing. In the earlier stages of development, however, one finds expressions and explanations that reveal the underlying structural similarity of US balancing tests and the European proportionality inquiry. In 1961, the US Supreme Court (Frankfurter J) held in a case involving the Communist Party that ‘compulsory disclosure of the names of an organization’s members may in certain instances *infringe constitutionally protected rights of association*’.<sup>9</sup>

But to say this much is only to recognize one of the points of reference from which analysis must begin. To state that individual liberties may be affected is to establish the condition for, not to arrive at the conclusion of, constitutional decision. Against the impediments which particular governmental regulation causes to entire freedom of individual action, there must be weighed the value to the public of the end which the regulation may achieve (emphasis added).<sup>10</sup>

Here we can discern the same two-stage process that is overt in the European proportionality inquiry. A constitutional right may be justifiably infringed. The infringement of the right provides the condition for balancing; a court’s conclusion states not the meaning or content of the right itself but the result of balancing.

### III. NECESSITY AND BALANCING

The European proportionality inquiry is sometimes thought to be distinguishable from US balancing tests because of its formal, multi-step structure.

Many formal statements of the European proportionality inquiry follow the four-step template described above: (1) legitimacy, (2) suitability, (3) necessity, and (4) balancing.

<sup>8</sup> *Miller v California*, 413 US 15 (1973) (United States).

<sup>9</sup> *Communist Party of the United States v Subversive Activities Control Bd*, 367 US 1, 90–91 (1961) (United States).

<sup>10</sup> *ibid.*

Some statements, however, articulate only three steps by omitting either legitimacy or suitability. Other, three-step statements conflate suitability and necessity (because the latter implies the former), while others conflate necessity and balancing into a single test. And in some cases, there is no apparent attempt to structure the inquiry into a series of steps. The tests of legitimacy and suitability are – to the extent they are separately addressed in a case – usually treated in a cursory fashion. It is very rare for a court to hold that a government measure lacks a legitimate aim or that the means are unsuitable for reaching that aim.

When a court rules against a governmental measure under the proportionality inquiry, it is nearly always under the rubric of ‘necessity’ or ‘balancing’ (steps 3 and 4 in the above template) – or a test that combines the two. In most cases we can discern a single test of *means–ends proportionality* that can be applied under either ‘necessity’ or ‘balancing’ as a formal label. The test of ‘balancing’ asks whether the burden that a governmental measure imposes on the exercise of a right is justified by the value of the aim. But asking whether means are ‘necessary’ also tends to involve balancing or weighing of the same factors because judging whether means are necessary must include an appreciation of what the end is, and – unless a restricted, technical use of ‘necessity’ is adopted – the value of the end as well.

The European Court of Human Rights has drawn an express equivalence between steps 3 (necessity) and 4 (balancing):

[T]he Court recalls that not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim ‘in the public interest’ [step 1], but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised [step 3, subsuming step 2]. This latter requirement [is also expressed] by the notion of the ‘fair balance’ that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights [step 4] . . . The requisite balance will not be found if the person concerned has had to bear ‘an individual and excessive burden’.<sup>11</sup>

The Court’s phrase, ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’, expresses what I have referred to as means–ends proportionality and encompasses both steps 3 and 4 in most applications of the proportionality inquiry.

It is possible, however, to conceive of steps 3 and 4 as logically distinct. One way is to treat step 3 as an essentially *technical* inquiry into whether there are alternative, less restrictive means for reaching *precisely the same goal* as would be achieved by the governmental measure in question, postponing until step 4 evaluation of the government’s aim or its importance relative to the burden on the right. An example of the technical approach to step 3 is the Israeli Supreme Court’s judgment in *Beit Sourik Village Council v Israel* (Barak J),<sup>12</sup> which concerned a security fence that the Israeli Defense Force (IDF) proposed to build along 40 kilometres in Judea and Samaria (the West Bank) in order to control and limit access to certain territory and cities in Israel. The purpose of the fence, according to the Court, was to counter the campaign of terror that certain Palestinian groups waged against Israel beginning in 2003.<sup>13</sup> The IDF commander in the West Bank

<sup>11</sup> *Lithgow v United Kingdom* (App no 9006/80) (1986) 8 EHRR 329, para 120 (ECtHR).

<sup>12</sup> HCJ 2056/04, *Beit Sourik Village Council v Israel* [2005] Isr SC 58(5) 807 (Israel).

<sup>13</sup> *ibid*, para 1.

issued several orders to take possession of land for the purpose of building the fence. These orders were challenged by petitioners from West Bank towns and villages, who proposed an alternative route for the fence that would have a reduced impact on the amount of farmland taken and on the ability of residents to access that farmland. Employing the proportionality inquiry, the Court held that the orders to seize the land were *necessary* because the alternative route proposed by the petitioners would not provide the same degree of security as the route proposed by the IDF commander.<sup>14</sup> At the balancing stage, however, the Court held that the effects of the IDF commander's route were disproportionate to its benefits. The Court concluded that IDF commander's route would provide only a 'minute' security advantage over the petitioner's proposed alternative route, while having a 'large difference' in impact on the petitioner's interests.<sup>15</sup> Thus the IDF commander's route was considered a *necessary* means even though the security advantage it offered was 'minute'.

In such a technical approach a measure is necessary if proposed alternative means would not achieve the government's goal in precisely the same degree. In a case like this, many courts would not single out 'necessity' as a step to be followed by a separate balancing step. Instead they would either proceed directly to a balancing test or – what amounts to essentially the same thing – treat 'necessity' so as not to require that the precise effects aimed for by the government be achieved, but rather to involve appraising the degree to which the government's general aim needs to be satisfied, in light of the severity of the burden imposed by a measure. There are few cases in which courts hold that a measure fails the necessity test because there are alternative, less-restrictive means for achieving the measure's aim in the exact degree sought by the government. There are even fewer where it can be confidently asserted that the court reached such a result while acknowledging and accepting the full extent of the government's aim. It might be thought that labelling of foodstuffs or other products with regard to health dangers is an example of a less restrictive alternative to, say, a prohibition on selling products with a certain unhealthy ingredient, showing that a total ban on the ingredient is unnecessary. But if the total ban would provide even 'minute' health advantages (to use Barak's term) over the labelling approach, then it is 'necessary' under the technical conception exhibited in *Beit Sourik Village Council*.

Some cases conclude that a governmental measure is unnecessary by not fully accepting the government's aim, but rather restricting or re-characterising it. Consider the European Court of Justice's ruling in the *Beer Purity* case.<sup>16</sup> German law provided that beverages could be sold as 'Bier' only if they were brewed entirely with certain ingredients. When this was challenged as a restraint on trade, one of the grounds advanced by Germany to justify the restraint was consumer protection: since German consumers linked the term 'Bier' to beverages manufactured solely from the ingredients listed in the beer purity laws, they would be misled if beverages made from other ingredients were marketed as 'Bier'. The ECJ rejected this aim in its broad form as illegitimate, reasoning that consumers' conceptions vary from one Member State to another and can evolve within one Member State, and the facilitation of such variation and change is one of the aims of the common market.<sup>17</sup> It was legitimate, however, 'to seek to enable consumers

<sup>14</sup> *ibid*, para 56.

<sup>15</sup> *ibid*, para 61.

<sup>16</sup> Case 178/84, *Commission v Germany* [1987] ECR 1227 (ECJ).

<sup>17</sup> *ibid*, paras 31–34.

who attribute specific qualities to beers manufactured from particular raw materials to make their choice in the light of that consideration'.<sup>18</sup> This objective could be accomplished by requiring sellers to affix labels describing the nature of a product. It did not require the more restrictive means of an outright prohibition on using 'Bier' as a description for any beverage not conforming to the German beer purity laws. The ECJ thus concluded that the prohibition on using the label 'Bier' was unnecessary by rejecting part of the government's aim as illegitimate.

In many cases in which courts hold that a governmental measure is not necessary, or that there are less restrictive alternatives, one will find that the conclusion is based upon an explicit or implicit evaluation of the value of the aim in comparison to the burden of the means, or upon an explicit or implicit judgement that the government's aim need not be realised to the precise extent sought by the government. Whenever this occurs, there is an effective conflation of steps 3 and 4 into a single test of means–ends proportionality. This single test can be expressed as follows: does a governmental measure excessively impair or burden an individual right in comparison to the value of the aim to be achieved? Evidence of the conflation of the tests of necessity (or minimal impairment) and balancing (proportionality in the strict sense) can be found in a study of cases in the Supreme Court of Canada from 1986 to 1997, which concluded that: '*In every instance in which the minimal impairment test was passed, the proportionality test was passed. In every instance that the minimal impairment test was failed, the proportionality test was either failed or not considered*'.<sup>19</sup> Most Canadian cases are resolved at the step of necessity or minimal impairment; the cases that reach the balancing step usually recapitulate the reasoning in the prior step.<sup>20</sup> Although the Canadian Supreme Court has occasionally stated that there is a distinction between steps 3 and 4,<sup>21</sup> in practice it has conflated them.

David Bilchitz argues in [chapter three](#) of this volume against treating the necessity step in the narrow, technical sense discussed here, and in favour of a fuller and more robust approach to necessity, with four distinct sub-parts.<sup>22</sup> In the initial stages of his proposed necessity test the court identifies and assesses feasible alternatives to a proposed measure, and at the last stage – which in Bilchitz's scheme is termed MN4 and described as an 'overall comparison' and a 'balancing exercise' – the court asks 'whether the government measure is the best of all feasible alternatives, considering both the degree to which it realises the government objective and the degree of impact upon fundamental rights ("the comparative component")'.<sup>23</sup> Following this necessity test, in the final stage of the proportionality inquiry, the court applies a balancing test to the best of the feasible alternatives, asking whether 'the benefits of that measure (in relation to the purpose the government wishes to achieve) outweigh the costs for fundamental rights'.<sup>24</sup>

<sup>18</sup> *ibid*, para 35.

<sup>19</sup> LE Trakman, W Cole-Hamilton and S Gatién, '*R v Oakes* 1986–1997: Back to the Drawing Board' (1998) 36 *Osgoode Hall Law Journal* 83, 103.

<sup>20</sup> F Iacobucci, 'Judicial Review by the Supreme Court of Canada under the Canadian Charter of Rights and Freedoms: The First Ten Years' in DM Beatty (ed), *Human Rights and Judicial Review* (Dordrecht, Martinus Nijhoff, 1994) 121.

<sup>21</sup> *Eg, Thomson Newspapers v Canada (Att-Gen)* [1998] 1 SCR 877, at para 125 (Canada).

<sup>22</sup> D Bilchitz, 'Necessity and Balancing', [chapter three](#) of this volume, pp 51–57.

<sup>23</sup> *ibid* p 61.

<sup>24</sup> *ibid* p 60.

Since my aim in this chapter does not include evaluating the proportionality test, this is not the place to assess whether it would be sensible to adopt Bilchitz's proposal for the necessity test. I suspect, however, that if it were adopted, in practice the vast majority – if not all – cases would be resolved at the necessity stage rather than the balancing stage. Bilchitz says that the balancing at MN4 is more 'restrained' than that which traditionally takes place at the balancing stage, and that the latter 'involves a much wider enquiry'.<sup>25</sup> But the only example he gives of a law that would be judged 'necessary' but still fail at the balancing stage is a hypothetical law with an artificially narrow aim that is constructed in such a way that the possibility of considering less restrictive alternatives is excluded from the outset. Bilchitz points<sup>26</sup> to Dieter Grimm's example of a law that authorises the police to use deadly force to prevent the destruction of property:

Take the hypothetical case of a law that allows the police to shoot a person to death if this is the only means of preventing a perpetrator from destroying property. In Germany, property is itself constitutionally guaranteed; protection of property certainly is a lawful, even an important, purpose. Shooting a perpetrator to death is a suitable means of preventing him from destroying property. Since the shooting is allowed only if no other means are available, the necessity test of the second step is also passed. If one had to stop here, the balance between life and property could not be made. The law would be regarded as constitutional, and life would not get the protection it deserves.<sup>27</sup>

The problem with this hypothetical, for Bilchitz, is that it *defines the aim in term of the means*. The proposed law – or at least the only part brought into view – aims to protect only that property in respect of which the use of deadly force is the only effective means to prevent its destruction. This is an infinitesimal percentage of all property. If we consider a broader context and the aim of protecting property in general, it is clear that there are means of regulation that would achieve the general aim without authorising the use of deadly force. Grimm's hypothetical demonstrates the need for distinct necessity and balancing stages by framing the issue with an artificially narrow law and then using the technical conception of necessity according to which the law must achieve the precise extent of the government's aim. If we use Bilchitz's non-technical version of the necessity test and apply it against the backdrop of the aim of protecting property in general, it would be clear that a law that authorises use of deadly force is not, in the wording of Bilchitz's MN4, 'the best of all feasible alternatives, considering both the degree to which it realises the government objective and the degree of impact upon fundamental rights'.<sup>28</sup>

#### IV. TIERED SCRUTINY AND VARIABLE INTENSITY OF REVIEW

As in the European proportionality inquiry, the underlying structure of most US constitutional rights cases requires a decision whether a governmental measure imposes a burden on a right or right-protected interest that outweighs the value of the aim. In many cases, however, this is overlaid by a framework instructing courts to apply different levels of scrutiny according to the category of right or interest in question.

<sup>25</sup> *ibid* p 60.

<sup>26</sup> *ibid*, text to fn 75.

<sup>27</sup> D Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383.

<sup>28</sup> Chapter three of this volume, p 61.



The foundation for the tiered-scrutiny approach was laid in *United States v Carolene Products Co* (1938),<sup>29</sup> which signalled a departure from the US Supreme Court's practice during the 30-year period after *Lochner v New York* (1905)<sup>30</sup> of applying intense scrutiny to laws regarding workplace regulation, wages, and other economic matters (Section V below considers *Lochner* in further detail). The Court upheld the consumer-protection law in *Carolene Products* because it had a 'rational basis', and this set the standard for reviewing economic and other general regulation that persists today. The Court suggested, however, in the famous footnote 4 of that decision, that it would more intensively review legislation that 'appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments'.<sup>31</sup> The Court further explained that

prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.<sup>32</sup>

In the 75 years since *Carolene Products* the Supreme Court has gradually developed doctrines providing that a particular degree of scrutiny is appropriate for certain categories of case. Standard textbook analysis identifies three basic levels:<sup>33</sup>

- (1) *Strict scrutiny* requires that a governmental measure be *narrowly tailored* and advance a *compelling* state interest.
- (2) *Intermediate scrutiny* requires that a measure *substantially promote* an *important* state interest.
- (3) *Minimal scrutiny* (or *rational basis* review) requires a measure to be *rationally related* to a *legitimate* state aim.

Rational basis review is the default for regulation regarding workplace, trade, and economic matters, and for most regulation not affecting an enumerated or fundamental constitutional right. It excludes balancing of means and ends as well as any close inquiry into the empirical basis for a measure; courts defer to legislative findings of fact, or to the absence of fact-finding if a set of facts to support the measure can be rationally supposed to exist. The test resembles the first two steps of the European proportionality inquiry and indeed could be restated in the latter's terms. A governmental measure will be upheld if it has a legitimate aim and suitable ('rationally related') means. It is rare for courts to conclude that a governmental measure lacks a rational basis.<sup>34</sup>

Strict scrutiny was crystallised in First Amendment cases in the late 1950s and early 1960s.<sup>35</sup> Prior to that time the Supreme Court oscillated between (i) treating the First Amendment as an absolute right, seeking to delineate its content and scope, and (ii) applying freestanding balancing tests.<sup>36</sup> An example of the latter is *Schneider v State* (1939), where the Court held:

<sup>29</sup> *United States v Carolene Products Co*, 304 US 144 (1938) (United States).

<sup>30</sup> 198 US 45 (1905) (United States).

<sup>31</sup> *Carolene Products*, 304 US 144 (n 27 above) Stone J.

<sup>32</sup> *ibid.*

<sup>33</sup> See, eg, E Chemerinsky, *Constitutional Law: Principles and Policies*, 4th edn (New York, Wolters Kluwer, 2011) 687–95.

<sup>34</sup> *ibid.*, 695.

<sup>35</sup> See SA Siegel, 'The Origin of the Compelling State Interest Test and Strict Scrutiny' (2006) 48 *American Journal of Legal History* 355, 359–60.

<sup>36</sup> *ibid.*, 375.



In every case, therefore, where legislative abridgment of rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify [diminishing] the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to *weigh the circumstances and to appraise the substantiality of the reasons* advanced in support of the regulation of the free enjoyment of rights (emphasis added).<sup>37</sup>

In a 1957 decision holding that a college professor did not have to answer questions from a State Attorney General about the alleged subversive tendencies of his teaching, Justice Frankfurter held that '[p]olitical power must abstain from intrusion into this activity of freedom . . . except for reasons that are exigent and obviously compelling'.<sup>38</sup> Justice Brennan linked the phrase 'compelling state interest' with 'narrow tailoring', an expression for analysis that considered less restrictive alternatives, in *Sherbert v Verner*, a 1963 case on free exercise of religion.<sup>39</sup> Linking these tests together proved a durable framework, which the Supreme Court adopted in many doctrinal areas in the ensuing years, during which it became known under the label of 'strict scrutiny'. Led by Justice Brennan, the Court applied strict scrutiny with vigour in the 1960s in cases involving civil liberties and equal protection, striking down most laws considered under that standard.<sup>40</sup> In 1972, Gerald Gunther observed that the standard was "strict" in theory, fatal in fact',<sup>41</sup> a phrase that has been frequently used by US academics to indicate the small chance of a law surviving once a court determines that it falls under this standard. The strict scrutiny framework applies to most cases brought pursuant to the First Amendment, including cases concerning restrictions on content in the context of freedom of expression, freedom of association, and certain categories of religious liberty claims.<sup>42</sup> Strict scrutiny has also been applied to an open-ended category of rights not textually specified in the Constitution but held by the Court to be 'fundamental', including the right to travel, the right to marry, the right of parents to direct their children's upbringing, and the right to bodily integrity (in contexts such as compulsory medical treatment of criminal defendants).<sup>43</sup> In the context of challenges based on the 14th Amendment's Equal Protection Clause, strict scrutiny applies to 'suspect classifications' – chiefly those based on race, national origin, and similar criteria.

Intermediate scrutiny is a category less clearly demarcated than strict scrutiny. In some areas the Supreme Court has indicated a need for a level of scrutiny between rational basis review and strict scrutiny. In *Craig v Boren*, 429 US 190 (1976), the Court adopted an intermediate level of scrutiny for Equal Protection Clause challenges to classifications based on gender. The Court has applied intermediate scrutiny to classifications based on illegitimacy<sup>44</sup> and in some First Amendment cases, including challenges to

<sup>37</sup> *Schneider v State (New Jersey)*, 308 US 147, 161 (1939) (United States).

<sup>38</sup> *Sweezy v New Hampshire*, 354 US 234, 262 (1957) (United States) (Frankfurter J, concurring).

<sup>39</sup> *Sherbert v Verner*, 374 US 398 (United States).

<sup>40</sup> SA Siegel, 'The Origin of the Compelling State Interest Test and Strict Scrutiny' (2006) 48 *American Journal of Legal History* 355, 359–60.

<sup>41</sup> G Gunther, 'The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection' (1972) 86 *Harvard Law Review* 1, 8.

<sup>42</sup> A Winkler, 'Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts' (2006) 59 *Vanderbilt Law Review* 793, 797.

<sup>43</sup> *ibid.*

<sup>44</sup> *Reed v Campbell*, 476 US 852 (1986) (United States).

regulation of commercial speech,<sup>45</sup> expressive conduct,<sup>46</sup> and content-neutral regulations of the time, place, or manner of speech.<sup>47</sup>

As seen in the formulations above, both strict and intermediate scrutiny involve an inquiry into whether the means adopted in governmental measures are proportionate to the value of the aim or state interest. In strict scrutiny, courts ask whether there are available less restrictive alternatives in determining whether the governmental measure is 'narrowly tailored' – similarly to the necessity component of the European proportionality inquiry, which is sometimes phrased in terms of 'minimal impairment'. In intermediate scrutiny courts also appraise the relationship between the means and ends of government action. The tiered scrutiny approach appears to differ from the European proportionality inquiry in that it does not involve freestanding balancing along a sliding scale of (theoretically) infinite degrees. Instead, once the correct level of scrutiny is ascertained, courts are instructed simply to ask whether the state interest is 'compelling' or 'important'. This difference, however, is not as strong as it may appear at first.

The application of tiered scrutiny involves more than just assessment of whether governmental aims are 'compelling' or 'important' and whether means are appropriately tailored. Courts also inquire into the nature and quality of the evidence regarding whether a governmental measure will in fact achieve its aims, or how likely it is to achieve the full extent of its aims. Courts in the United States exhibit wide variety in how they characterise the government's burden to produce empirical evidence – and even as to basic procedural questions such as whether the government or challenger bears the burden of proof – and in the intensity with which they scrutinise such evidence.<sup>48</sup> Even the first step of identifying the aim of a governmental measure is contestable. Supreme Court justices sometimes disagree 'over whether the search for legitimate purposes should be confined to the purposes stated by the legislature, or to the actual purposes of the legislation, or extended to any conceivable purpose, however outlandish or hypothetical'.<sup>49</sup> In several areas the Court has not articulated a particular level of scrutiny and appears to balance competing interests in a relatively freestanding way.<sup>50</sup>

Justices often argue at length about what level of scrutiny to apply, the nature of a particular level of scrutiny, and whether or not fellow justices have correctly adhered to the appropriate standard. Justice Scalia, for example, contends that Justice Ginsberg elevated intermediate scrutiny for gender classifications to strict scrutiny by requiring an 'exceedingly persuasive justification',<sup>51</sup> and he accused the majority in *Lawrence v*

<sup>45</sup> *Virginia State Pharmacy Bd v Virginia Citizens Consumer Council*, 425 US 748 (1976) (United States); *Central Hudson Gas & Electric Corp v Public Service Commission*, 447 US 557 (1980) (United States).

<sup>46</sup> *United States v O'Brien*, 391 US 367 (1968) (United States).

<sup>47</sup> *Ladue v Gilleo*, 512 US 43 (1994) (United States).

<sup>48</sup> See KC Davis, 'Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court' (1986) 71 *Minnesota Law Review* 1.

<sup>49</sup> Calvin Massey, 'The New Formalism: Requiem for Tiered Scrutiny?' (2004) 6 *University of Pennsylvania Journal of Constitutional Law* 945, 951.

<sup>50</sup> Eg, *Frisby v Schultz*, 487 US 474 (1988) (United States) (balancing rights of privacy and expression); *Columbia Broadcasting System, Inc v Democratic National Committee*, 412 US 94, 102–3 (1973) (United States) ('Balancing the various First Amendment interests involved in the broadcast media . . . is a task of great delicacy and difficulty'); *Mathews v Eldridge*, 424 US 319, 339–49 (1976) (United States) ('In striking the appropriate due process balance, the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits').

<sup>51</sup> *United States v Virginia*, 518 US 515, 570–71 (1996) (United States) (Scalia J, dissenting).

Texas,<sup>52</sup> which struck down a sodomy law, of using ‘an unheard-of form of rational basis review that will have far-reaching implications beyond this case’.<sup>53</sup> In 1995 Justice O’Connor, in the majority opinion in *Adarand Constructors v Peña*, stated that the strict scrutiny standard ‘says nothing about the validity of any particular law’ and expressed a wish ‘to dispel the notion of “strict in theory, fatal in fact”’.<sup>54</sup> Her opinion in *Grutter v Bollinger* (2003) upheld an affirmative action programme under the strict scrutiny standard, and observed in applying it that courts are to take ‘relevant differences into account’ because ‘context matters’.<sup>55</sup> Justice Kennedy, in dissent, argued that Justice O’Connor paid too much deference to state officials who had decided to allow race as a factor in university admissions, and thus failed to properly apply the strict scrutiny standard.<sup>56</sup>

Numerous scholars have doubted the coherence of the three-tier framework and the consistency with which it is applied, and there is a cottage industry among US academics of deconstructing – or reconstructing – the framework of tiers. Some have called for recognition of a category sometimes called ‘rational basis with bite’, because in some rational basis cases the Supreme Court has struck down laws after reviewing their purposes with more than the usual scrutiny.<sup>57</sup> One scholar has argued that there are now *seven* distinct tiers of scrutiny;<sup>58</sup> others have suggested that the whole structure of tiered scrutiny may be breaking down under the strain of inconsistent application.<sup>59</sup> Although some argue that *Grutter v Bollinger* represents a new kind of looser strict scrutiny, Adam Winkler found support for O’Connor’s view, expounded in that case, that application of the standard is context-dependent, in an empirical survey of 447 federal cases applying strict scrutiny from 1990 to 2003.<sup>60</sup> Winkler found that approximately 30 per cent of governmental measures considered were upheld, and concluded that the standard ‘is not nearly as deadly as generations of lawyers have been taught’.<sup>61</sup>

Supreme Court justices have disagreed not only about the nature and application of the tiers of scrutiny but more fundamentally about the viability of certain fundamental features of the framework and about the propriety of alternative approaches. Justice Blackmun called into question the basic elements of the strict scrutiny test in 1979:

Although I join the Court’s opinion . . . I add these comments to record purposefully, and perhaps somewhat belatedly, my unrelieved discomfort with what seems to be a continuing tendency in

<sup>52</sup> *Lawrence v Texas* 539 US 558 (2003) (United States).

<sup>53</sup> *ibid*, 586 (Scalia, J, dissenting).

<sup>54</sup> *Adarand Constructors, Inc v Peña*, 515 US 200, 237 (1995) (United States).

<sup>55</sup> *Grutter v Bollinger*, 539 US 306, 326–28 (2003) (United States).

<sup>56</sup> *ibid*, 393 (Kennedy J, dissenting).

<sup>57</sup> GL Pettinga, ‘Rational Basis with Bite: Intermediate Scrutiny by Any Other Name’ (1986) 62 *Indiana Law Journal* 779; ET Sullivan and RS Frase, *Proportionality Principles in American Law: Controlling Excessive Government Action* (Oxford, OUP, 2009) 63–66.

<sup>58</sup> R Kelso, ‘United States Standards of Review Versus the International Standard of Proportionality: Congruence and Symmetry’ (29 January 2012) available at SSRN: [ssrn.com/abstract=1995140](https://ssrn.com/abstract=1995140) or [dx.doi.org/10.2139/ssrn.1995140](https://dx.doi.org/10.2139/ssrn.1995140).

<sup>59</sup> Calvin Massey, ‘The New Formalism: Requiem for Tiered Scrutiny?’ (2004) 6 *University of Pennsylvania Journal of Constitutional Law* 945. See also Jeffrey Shaman, ‘Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny’ (1984) 45 *Ohio State Law Journal* 161.

<sup>60</sup> A Winkler, ‘Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts’ (2006) 59 *Vanderbilt Law Review* 793. Although the Supreme Court upheld only one of 12 measures challenged under strict scrutiny from 1990 to 2002, district and appellate courts upheld measures at a higher rate: *ibid*, 796.

<sup>61</sup> *ibid*, 796–97.

this Court to use as tests such easy phrases as ‘compelling interest’ and ‘least drastic [or restrictive] means.’ . . . I have never been able fully to appreciate just what a ‘compelling state interest’ is. If it means ‘convincingly controlling,’ or ‘incapable of being overcome’ upon any balancing process, then, of course, the test merely announces an inevitable result, and the test is no test at all. And, for me, ‘least drastic means’ is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less ‘drastic’ or a little less ‘restrictive’ in almost any situation, and thereby enable himself to vote to strike legislation down.<sup>62</sup>

Justice Stevens endorsed and quoted these words,<sup>63</sup> and Justice Marshall argued against tiered scrutiny and for recognising a spectrum with degrees of scrutiny in the equal protection context.<sup>64</sup> Justice Breyer has argued for recognition of a freestanding balancing test where a law ‘significantly implicates competing constitutionally protected interests in complex ways’:

In such circumstances . . . the Court has closely scrutinized the statute’s impact on those interests, but refrained from employing a simple test that effectively presumes unconstitutionality. Rather, it has balanced interests. And in practice that has meant asking whether the statute burdens any one such interest *in a manner out of proportion* to the statute’s salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative) (emphasis added).<sup>65</sup>

The italicised phrase evokes the European proportionality inquiry.

Tensions came to a head in *District of Columbia v Heller* (2008),<sup>66</sup> in which the Supreme Court struck down Washington DC’s general ban on possession of handguns on the ground that it violated the right to keep and bear arms in the Second Amendment. Justice Breyer, in dissent (joined by Souter, Ginsburg, and Stevens), argued that strict scrutiny was inappropriate and that the Court should adopt an ‘interest-balancing inquiry’, asking ‘whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests’.<sup>67</sup> Writing for the majority, Justice Scalia (joined by Justices Roberts, Alito, Thomas, and Kennedy) took issue with Justice Breyer:

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach. The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.<sup>68</sup>

<sup>62</sup> *Illinois State Board of Elections v Socialist Workers Party*, 440 US 173, 188–89 (1979) (United States).

<sup>63</sup> *Widmar v Vincent*, 454 US 263, 282 (1981) (United States) (Stevens J, concurring). But see *Reno v American Civil Liberties Union*, 521 US 844 (1997) (United States), where Justice Stevens, writing for the majority, applied strict scrutiny and a particularly searching version of the ‘least restrictive alternative’ test.

<sup>64</sup> *San Antonio Independent Schools District v Rodriguez*, 411 US 1, 98–100 (1973) (United States).

<sup>65</sup> *Nixon (Attorney General of Missouri) v Shrink Missouri Government PAC*, 528 US 377, 402 (2000) (United States) (Breyer J, concurring).

<sup>66</sup> *District of Columbia v Heller*, 554 US 570 (2008) (United States).

<sup>67</sup> *ibid*, 690.

<sup>68</sup> *ibid*, 625.

The majority did not specify what level of scrutiny to apply but rather stated that ‘under any of the standards of scrutiny that we have applied to enumerated constitutional rights’, the ban on handguns ‘would fail constitutional muster’.<sup>69</sup> The majority indicated, however, that rational basis review would not apply to gun regulation, and stated further that the Second Amendment right is limited and that traditionally accepted regulations – such as prohibitions on carrying concealed weapons and possession of guns by felons or the mentally ill, or in sensitive places such as schools and government buildings – would survive scrutiny.<sup>70</sup>

Notwithstanding Justice Scalia’s expressed distaste for a freestanding balancing inquiry, *Heller* demonstrates the limits of the tiered scrutiny approach. Indeed, precisely because the majority both (i) acknowledged that the right to bear arms is limited and (ii) did not rely on a particular tier of scrutiny, it is difficult to escape the conclusion that the Court’s decision involved some kind of implicit evaluation or weighing of the goals of the legislation against the interference with the right. Even if the Court did not do so in *Heller* itself, in future cases that challenge laws of the kind which the Court indicated are probably constitutional, the Court will either have to adopt strict scrutiny or intermediate scrutiny, or resort to freestanding balancing. The gradual development of the tiered scrutiny framework itself has involved appraising the value of different kinds of claimed rights. *Heller* demonstrates that this is an ongoing process that requires a decision on what level of scrutiny to adopt in cases that present new issues – or whether any formal category of scrutiny is to be adopted at all. Given all this, it is better to think of tiered scrutiny as *formalised* or *structured* balancing than to consider it something fundamentally distinguished from balancing or something that completely displaces the kind of balancing used in what I have described as the core means–ends proportionality test in the European inquiry.

Tiered scrutiny is the sort of thing that should be expected after a century of constitutional rights adjudication in a system that combines strong judicial review of legislation, vaguely worded rights and other constitutional provisions, and a common law approach to precedent. Experience has shown that constitutional systems with vague constitutional rights have gravitated toward the use of balancing tests and the two-stage process described in section II that asks whether limitations on rights are justified, rather than treating rights as absolute and seeking to define their content and delineate their scope. Many judges, however, have an instinctive aversion to using unconstrained balancing tests, especially to overturn legislative decisions – or at least an aversion to accusations that they are relying on their own subjective weighing of the interests in a case.<sup>71</sup> Relying on precedent and technical structures such as tiered scrutiny provides a semblance of

<sup>69</sup> *ibid*, 628–29.

<sup>70</sup> *ibid*, 626–27.

<sup>71</sup> Jochen von Bernstorff in his [chapter four](#) contribution to this volume notes that the global rise of unconstrained or ad hoc balancing has provoked strong criticism from some scholars, and that ‘particularly harsh criticisms have been levelled against the European Court of Human Rights, according to which its excessive reliance on ad hoc balancing has produced a highly politicised form of adjudication’ (p 65). The German Constitutional Court also has come under a ‘new wave of scholarly attacks for stifling collective self-determination through its general methodological approach to human rights’ adjudication (p 65). While balancing has also received wide endorsement from other scholars, as von Bernstorff notes, it is unlikely that judges are indifferent to the academic criticisms and to a more popular discourse about constitutional adjudication that shares some of the concerns of the scholarly critique. One of the main concerns of this critique noted by von Bernstorff is that ad hoc balancing ‘produces a separation of powers problem by empowering courts to impose their own political considerations on democratically-elected parliaments’ (pp 65–66).

ordinary judicial craft (and perhaps the reality, to some degree), and helps to insulate judges from charges of activism.<sup>72</sup> In a common law system precedent has an intrinsic force of its own, producing a tendency for judges to deal with claims of right in a manner similar to previous cases. When a case pronounces upon the importance of a right or the kind of state interest that justifies limiting it, later courts will seek to align their judgments with its approach. Thus it would have been surprising if US courts had not developed from the tissue of constitutional precedent some kind of structured framework involving tiers of scrutiny that could be employed to answer the difficult and complex questions that arise in constitutional rights adjudication. The building of such a structured framework could never produce airtight categories or bright lines, because of the tremendous variety of claims based on constitutional rights; thus the kinds of arguments that justices and scholars have had over the application of tiered scrutiny are also to be expected.

Even in systems without a strong commitment to precedent one finds courts employing general categories and stock phrases to describe the intensity of review appropriate in a given case. The European Court of Human Rights has held that some rights can be restricted only on grounds that are ‘convincingly established’ or ‘convincing and compelling’,<sup>73</sup> while for less important rights national authorities are allowed a wider margin of appreciation. In constitutional systems with a stronger commitment to precedent, such as is reflected in the German doctrine that rulings of the Federal Constitutional Court are binding *erga omnes*, there is more potential for development of structures approximating that of tiered scrutiny in the United States. In the *Co-determination Case*, the FCC developed what Dieter Grimm calls a ‘scale of scrutiny’ for testing the empirical judgements of the legislature; it ranges, he says,

from whether the legislature’s prognostications are evidently wrong (*Evidenzkontrolle*) to a reasonableness test (*Vertretbarkeitskontrolle*) to strict scrutiny (*intensivierte inhaltliche Kontrolle*), depending on the nature of the policy area, the possibility of basing the decision on reliable facts, and the importance of the constitutionally protected goods or interests at stake.<sup>74</sup>

In the next section we will see that in a leading case the FCC adopted a three-level scale for evaluating interferences with the right to freedom of occupation.

## V. THE HISTORICAL ORIGINS OF PROPORTIONALITY AND BALANCING IN THE US AND GERMANY

I observed in section II that the modern European proportionality inquiry has roots in rights-limitation clauses such as those in ECHR articles 8 to 11. These clauses provide a textual anchor for proportionality in constitutional rights adjudication, but the proportionality inquiry can be traced back further still. This section shows that the US Supreme Court and German administrative courts adopted proportionality principles as constraints

<sup>72</sup> Von Bernstorff sees Robert Alexy’s theory of constitutional rights as an attempt to provide mathematical objectivity to the balancing exercise ‘in order to be able to reject the charge of judicial irrationalism’; equally, this could be used to dispel charges that rights adjudication is politicised by the use of balancing tests.

<sup>73</sup> See *Demir v Turkey* (App no 34503/97) (2009) 48 EHRR 54, [119] (ECtHR); *Dupuis v France* (App no 1914/02) (2008) 47 EHRR 52, [36] (ECtHR).

<sup>74</sup> D Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57 *University of Toronto Law Journal* 383.



on the police power<sup>75</sup> of the state in the late nineteenth century. An investigation of this history helps to demonstrate the underlying similarity of modern US balancing tests and the European proportionality inquiry.

Alec Stone Sweet and Jud Matthews have shown that the notion of proportionality in German legal thinking arises in the late eighteenth century in the work of jurists such as Carl Gottlieb Svarez (1746–98) and Günther Heinrich von Berg (1765–1843), both of whom argued that states were bound to respect natural rights to liberty.<sup>76</sup> Von Berg anticipated the modern approach to necessity and minimal impairment:

The first law . . . is this: the police power may go no farther than its own goals require. The police law may abridge the natural freedom of the subject, but only insofar as a lawful goal requires as much. This is its second law.<sup>77</sup>

Svarez promoted a similar idea in his theoretical work and, in his role as a drafter for the Prussian General Law of 1794 (*Allgemeines Landrecht für die Preußischen Staaten* (ALR)), contributed the following provision concerning police powers: ‘The office of the police is to take the *necessary measures* for the maintenance of public peace, security, and order’ (Ch 2, Title 17, § 10 ALR) (emphasis added).<sup>78</sup> This provided the textual hook for the judicial development of the principles of proportionality by the Prussian Higher Administrative Court (*Oberverwaltungsgericht*), which began operating in 1875 and became an influential expositor of administrative law.<sup>79</sup> As early as the 1880s the court began using ‘necessary measures’ in the quoted provision of the ALR as a principle of limitation in reviewing police action and measures.<sup>80</sup> In an 1895 treatise surveying the court’s cases, Otto Mayer popularised the term ‘proportionality’ (*Verhältnismäßigkeit*).<sup>81</sup> Like Svarez and von Berg, Mayer connected the idea to natural right or liberty: ‘natural rights demand that the use of police powers by the government be proportionate’.<sup>82</sup> Judges originally regarded proportionality primarily in terms of necessity or minimal impairment as in the case just described, and did not articulate the multi-step test we are familiar with today.<sup>83</sup> By the end of the nineteenth century administrative courts in other German states were following Prussia, and proportionality had a secure place in administrative law generally.<sup>84</sup>

In 1949 the German Basic Law (*Grundgesetz*) was adopted, providing a catalogue of individual rights that were to be judicially enforceable, primarily by the German Federal Constitutional Court (FCC). The Basic Law has no exact equivalent to the limitation clauses of the ECHR, but certain articles recognise that rights may be limited;<sup>85</sup> such limits, though, may not affect the ‘essence’ of a basic right (article 19). Scholars were soon

<sup>75</sup> The police power of the state, in 18th and 19th century English usage, did not refer specifically to law enforcement but to the general power of a state to promote the public peace and welfare, health and safety, and morals. See S Legarre, ‘The Historical Background of the Police Power’ (2007) 9 *University of Pennsylvania Journal of Constitutional Law* 745, 788.

<sup>76</sup> See generally A Stone Sweet and J Matthews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Columbia Journal of Transnational Law* 72, 98–103.

<sup>77</sup> *ibid.*, 99.

<sup>78</sup> *ibid.*, 100.

<sup>79</sup> *ibid.*

<sup>80</sup> *ibid.*, 101.

<sup>81</sup> *ibid.*

<sup>82</sup> *ibid.*, 101.

<sup>83</sup> *ibid.*, 101.

<sup>84</sup> *ibid.*, 101.

<sup>85</sup> Articles 17a, 18, and 19.

calling for the use of proportionality in the adjudication of rights.<sup>86</sup> In the *Land Election* case of 1954, which upheld an election law of Nordrhein-Westfalen against a constitutional challenge, the FCC observed that (i) the law served a constitutionally permissible end, (ii) included means that were suitable for attaining the end, and (iii) did not 'exceed the limits drawn by the principle of proportionality between ends and means'.<sup>87</sup> Stone Sweet and Matthews state that the first case to recognise balancing as a distinct step is the *Pharmacy Case* (*Apothekenurteil*) of 1958,<sup>88</sup> and quote the following language:

The individual's claim to freedom will have a stronger effect . . . the more his right to free choice of a profession is put into question; the protection of the public will become more urgent, the greater the disadvantages that arise from the free practicing of professions. When one seeks to maximize both . . . demands in the most effective way, then the solution can only lie in a careful balancing [*Abwägung*] of the meaning of the two opposed and perhaps conflicting interests.<sup>89</sup>

Following this statement, however, the FCC proceeded to set forth a gradation theory (*Stufentheorie*) not mentioned by Stone Sweet and Matthews, which approximates US-style tiered scrutiny more than it does a general balancing test. The Land of Bavaria limited the number of licensed pharmacies, and its Apothecary Act in section 3(1) allowed a new pharmacy to be licensed only if (i) it is in the public interest to secure the supply of the local population with medicines and (ii) the pharmacy would be economically viable and not threaten the viability of neighbouring pharmacies or the maintenance of the conditions needed for proper pharmacy operations.<sup>90</sup> An immigrant from East Germany who had been a licensed pharmacist there applied for a licence to open a pharmacy in a town in Upper Bavaria but was denied. He brought a claim that resulted in the FCC ruling that section 3(1) of the Act violated article 12 of the Basic Law, which provides: 'All Germans shall have the right freely to choose their occupation or profession, their place of work, and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law'. The FCC distinguished three types of regulation affecting the article 12 right and three corresponding levels of scrutiny.<sup>91</sup> When a law regulates the *practice* of an occupation, legislators may 'broadly consider calculations of utility' and impose limitations on a right in order to prevent detriment and danger to the public.<sup>92</sup> 'Here the Constitution protects the individual only against excessively onerous and unreasonable encroachments'.<sup>93</sup> This formulation resembles rational basis review, or minimal scrutiny, in the United States. When a law conditions *the right to take up an occupation* upon the fulfillment of objective requirements, thus impinging on the choice of occupation, regulations are legitimate 'only when such action is absolutely necessary to protect particularly important community interests; in all such cases the restrictive measures selected must entail the least possible interference'.<sup>94</sup> This

<sup>86</sup> Matthews and Stone Sweet (n 76 above), 104–5.

<sup>87</sup> BVerfGE 3, 383, at 399 (Germany).

<sup>88</sup> BVerfGE 7, 377 (Germany).

<sup>89</sup> BVerfGE 7, 377, at 405–5 quoted by Matthews and Stone Sweet (n 76 above), 107–8.

<sup>90</sup> BVerfGE 7, 377, at para 3 (Germany).

<sup>91</sup> In the following sentences I rely on translated excerpts from the case in D Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd edn (Durham NC, Duke University Press, 1997) 274–79.

<sup>92</sup> *ibid.*, 276.

<sup>93</sup> *ibid.*

<sup>94</sup> *ibid.*



is similar to strict scrutiny in the United States; at one point the FCC states that the right to choose an occupation may be restricted only for a 'compelling public interest'.<sup>95</sup> When a law conditions *admission to an occupation* on certain personal qualifications or criteria (eg, knowledge, skills, or schooling), 'any requirements laid down must bear a reasonable relationship to the end pursued'.<sup>96</sup> This is similar to intermediate scrutiny, and the FCC's rationale for this level is that applicants for various professions know in advance what the qualifications are and how to meet them.<sup>97</sup>

With regard to objective conditions over which an individual has no control, such as those in section 3(1) of the Apothecary Act, a higher level of scrutiny is needed. One reason for this, the FCC says, is that legislators 'will often not be able to show a connection between the limitation on occupational choice and the desired result', creating a danger of 'impermissible legislative motivations'.<sup>98</sup> The Court held that public health is 'an important community interest' and 'an orderly supply of drugs is crucial for the protection of public health' but questioned the extent to which the licensing restriction advanced those aims.<sup>99</sup>

The Bavarian legislature presumably had these objectives in mind, but between the lines of the legislation we can also discern the political aims of a pharmacy profession at work to protect its [narrow] interests and the traditional concept of the 'apothecary'.

The decisive question before us is whether the absence of this restriction on the establishment of new pharmacies would . . . in all probability disrupt the orderly supply of drugs in such a way as to endanger public health. We are not convinced that this danger is impending.<sup>100</sup>

The FCC concluded that the legislature's main motivation was not public health but 'to protect practising pharmacies from further competition, a motive which, by general consensus, can never justify a restriction on the freedom to choose an occupation'.<sup>101</sup>

The FCC thus demonstrates one of the uses of proportionality: imposing a strict level of scrutiny can flush out a legislature's real motives. I now turn to historical developments in the United States, and we will see that the FCC's reasoning on this point has an exact counterpart in the US Supreme Court's decision in *Lochner*.

In the later part of the nineteenth century, the US Supreme Court indicated that there are constitutional limitations on the police power held by the States. Soon after the end of the Civil War and ratification of the Fourteenth Amendment in 1868, individuals began making constitutional claims under that amendment against various State police power regulations. In the initial cases the Court refused these claims but significantly sketched outlines of limits on State power. In *Barbier v Conneley* (1885) the Court stated:

Regulations for [police] purposes may press with more or less weight upon one than upon another, but they are designed, not to impose *unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good*. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but

<sup>95</sup> *ibid.*

<sup>96</sup> *ibid.*

<sup>97</sup> *ibid.*

<sup>98</sup> *ibid.*, 277.

<sup>99</sup> *ibid.*

<sup>100</sup> *ibid.*, 277–78.

<sup>101</sup> *ibid.*

*legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not [prohibited by] the [Fourteenth] amendment* (emphasis added).<sup>102</sup>

In the phrases ‘unnecessary restrictions’, ‘as little individual inconvenience as possible’, and ‘limited in its application’, we can perceive an incipient necessity or minimal impairment test. The Supreme Court’s concern with class legislation that favours some and not others is close to the German FCC’s concern about anti-competitive motives in the *Pharmacy Case*. Two years later, in *Mugler v Kansas* (1887),<sup>103</sup> the Supreme Court held that it may be inferred that if a regulation enacted under the police power does not effectively promote its putative purpose, or exceeds proper limits, it is not in fact a true police power regulation but rather one enacted for an improper purpose, such as interfering with constitutionally protected liberties:

The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty, to look at the substance of things whenever they enter upon the inquiry *whether the legislature has transcended the limits of its authority*. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety *has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law*, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution (emphasis added).<sup>104</sup>

The Court continued, quoting *Patterson v Kentucky* (1878):

State legislation, *strictly and legitimately for police purposes*, does not, in the sense of the Constitution, necessarily intrench upon any authority which has been confided, expressly or by implication, to the National Government. The Kentucky statute under examination manifestly belongs to that class of legislation. It is, in the best sense, a mere police regulation, deemed essential to the protection of the lives and property of citizens (emphasis added).<sup>105</sup>

*Barbier* and *Mugler* thus gave an early articulation of the idea that later became known as ‘substantive due process’. This paradoxical name comes from the textual basis for these rulings, a clause in the Fourteenth Amendment that on its surface refers only to procedural limitations: ‘nor shall any State deprive any person of life, liberty, or property, without due process of law’. The Supreme Court decided that these rights are protected from certain kinds of deprivations and interferences even when they result from a duly enacted law enforced by appropriate procedure; these Fourteenth Amendment rights thus placed limits on the *substantive content* of the law – hence ‘substantive due process’. The first Supreme Court case to strike down a statute on the basis of substantive due process was *Allgeyer v Louisiana* (1897),<sup>106</sup> which broadly construed ‘liberty’ in the Fourteenth Amendment to include not only the right to be free from physical constraint such as incarceration, but to

embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts

<sup>102</sup> *Barbier v Connelley*, 113 US 27, 31–32 (1885) (United States).

<sup>103</sup> *Mugler v Kansas*, 123 US 623 (1887) (United States).

<sup>104</sup> *ibid*, 661.

<sup>105</sup> *ibid*, 666 (quoting *Patterson v Kentucky*, 97 US 501 (1878)).

<sup>106</sup> *Allgeyer v Louisiana* 165 US 578, 589 (1897) (United States).

which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.<sup>107</sup>

The right asserted here corresponds to article 12 of the German Basic Law considered in the *Pharmacy Case*.

The full flower of the idea of substantive due process, and of the incipient proportionality analysis of *Barbier* and *Mugler*, arrives with *Lochner v United States* (1905).<sup>108</sup> Here the Supreme Court struck down a provision in New York's Bakeshop Act 1895 that prohibited employees of bakeries from working more than 10 hours per day or 60 hours per week, on the ground that it violated the liberty of contract protected by substantive due process. The case has often been characterised as a 'formalist' decision that turned a blind eye to social realities. However, an investigation of the background of the case and the Court's reasoning will show that the decision was based on a proportionality test and close scrutiny of the evidence regarding the effectiveness of the Bakeshop Act.

My account begins with Henry Weismann, a trade unionist who was the most influential promoter of the Bakeshop Act. In an ironic turn of history, he also became the person most responsible for the successful constitutional challenge to it. His dual role in the events leading to the *Lochner* decision is a key to understanding it. Weismann, a German immigrant, became the unofficial leader of the bakers' union in New York and the editor of the *Baker's Journal*.<sup>109</sup> In 1894 he organised support for the Bakeshop Bill and instigated a series of newspaper articles exposing unsanitary conditions in bakeries, which captured public attention and contributed to the passage of the Act with unanimous support in the New York legislature.<sup>110</sup> The sanitary provisions of the Act were modelled on the English Bakeshop Regulation Act of 1863 and were widely supported.<sup>111</sup> The provision limiting the workday to 10 hours (and working week to 60 hours) was added at the urging of the bakers' union. Two main sectors of bakery owners also had reason to support the hours provision: (i) owners of large, unionised bakeshops; and (ii) owners of well-established, independent bakeries, who were largely of German descent.<sup>112</sup> These owners already operated bakeries according to a 10-hour workday or something near to it. In contrast, the bakeries run by more recent Italian, French, and Jewish immigrants often required workers to work much more than 60 hours per week, under inferior sanitary conditions.<sup>113</sup> Thus some established bakery owners welcomed the 10-hour law as a means for reducing competition from cheap labour. The alignment of interest of the bakers' union and the main bakery owners is reflected in an editorial in the *Baker's Journal* (likely penned by Weismann), which argued that the 10-hour day would solve the problems of '[t]he lack of work, increased numbers of apprentices, cheap labor, insane competition among employers, [and] the era of 3-cents loaves of bread'.<sup>114</sup> A contrasting editorial published the same day stated the official rationale: the Act was 'a

<sup>107</sup> *ibid.*

<sup>108</sup> 198 US 45 (1905) (United States).

<sup>109</sup> DE Bernstein, 'Lochner v. New York: A Centennial Retrospective' (2005) 83 *Washington University Law Quarterly* 1469.

<sup>110</sup> *ibid.*, 1479–80.

<sup>111</sup> *ibid.*, 1481.

<sup>112</sup> *ibid.*, 1476–77.

<sup>113</sup> *ibid.*, 1477.

<sup>114</sup> *ibid.*, 1481–82.

sanitary measure solely' and therefore 'will stand the closest scrutiny of constitutional lawyers and the courts'.<sup>115</sup>

After enactment of the Bill, the executive committee of the bakers' union elected Weismann to its highest office, international secretary.<sup>116</sup> In 1897 he resigned amid allegations of embezzlement and receiving kickbacks.<sup>117</sup> Weismann's next venture was to start his own bakery. He also studied law and became active in the Republican Party and the New York Association of Master Bakers, which represented primarily small bake-shops owned by German immigrants.<sup>118</sup> In this position Weismann soon found himself opposed to the 10-hour law he had helped to enact; he ascribed the switch not to a change of profession but a change of mind, though the former, he said, contributed to the 'intellectual revolution' that caused him to see the injustice of the law to employers.<sup>119</sup> Opposition to the law was growing among the Master Bakers' Association, in part due to issues regarding its enforcement. Minor violations of the law were routine and not widely prosecuted.<sup>120</sup> Owners believed that the law was being used as an instrument of revenge by disgruntled employees, or of blackmail by union negotiators.<sup>121</sup> The New York Master Bakers' Association, which now opposed the Act and wanted to bring a test case, found a willing participant in Joseph Lochner, the owner of a small bakery in Utica, New York, who had twice been convicted of violating the Act when an employee worked too many hours.<sup>122</sup> The Bakers' Association turned to none other than Henry Weismann to defend Lochner. Weismann was uniquely well situated to attack the law because of his inside knowledge that the hours provision of the Act had been motivated more by anti-competitive considerations than for reasons of health and sanitation.

This background of the case is often overlooked, as is the fact that Weismann filed a brief containing several pages of empirical information regarding working conditions in the baking trade and the causes of ill health and diseases among bakers.<sup>123</sup> Weismann used this evidence to argue that the 'hours law' was unnecessary and did little to promote the health of bakers. The brief included citations to three comparative mortality studies for occupations and professions, one of which found that bakers had a low mortality rate (18th out of 22 occupations surveyed), while two others placed bakers near the middle.<sup>124</sup> Weismann also cited articles from medical journals urging improved ventilation and sanitary reforms but not shorter hours; a *Lancet* article suggested that shorter hours would not alleviate health problems.<sup>125</sup>

The Supreme Court first considered the aim of the hours provision and rejected outright the legitimacy of enacting it as a 'labor law':

<sup>115</sup> *ibid*, 1481.

<sup>116</sup> *ibid*, 1484.

<sup>117</sup> *ibid*.

<sup>118</sup> *ibid*, 1484–85.

<sup>119</sup> 'Made the 10-hour law, then had it unmade'. *New York Times* (27 February 1905) p 5.

<sup>120</sup> DE Bernstein, 'Lochner v. New York: A Centennial Retrospective' (2005) 83 *Washington University Law Quarterly* 1469, 1485–86.

<sup>121</sup> *ibid*.

<sup>122</sup> *ibid*, 1487.

<sup>123</sup> Brief for Plaintiff in Error, *Lochner v New York* in PB Kurland and G Casper (eds), *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*, vol 14 (*Landmark Briefs*) (Washington, DC, University Publications of America, 1975). Frank Harvey Field was co-counsel with Weismann on the brief.

<sup>124</sup> *ibid*.

<sup>125</sup> *ibid*.

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract by determining the hours of labor in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State . . . The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker.<sup>126</sup>

Whatever one might think of this approach to constitutional protection of economic liberty, it was widely accepted at the time and common ground between the majority and the main dissent by Justice Harlan,<sup>127</sup> and between plaintiff and defendant. The State of New York made no attempt to defend the Act as a labour law, instead defending it under the police power.<sup>128</sup>

The crucial question, then, was whether – or to what degree – the hours law advanced health and safety.

The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. *The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate*, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor (emphasis added).<sup>129</sup>

Any ‘unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty’ would be annulled.<sup>130</sup> Here we find the basic elements of the modern proportionality test. An interference with a constitutional right is justified only if (i) the end is ‘appropriate and legitimate’, and (ii) the means has a ‘direct relation’ to the end – this and the Court’s rejection of unreasonable and unnecessary interferences correspond to modern tests of suitability and necessity. The Court does not explicitly mention balancing but implies its use in requiring an assessment of the degree to which the measure promotes the government’s aim. The question of the relationship of the means to the end would be determined by the empirical evidence. Though the Court did not cite Weisman’s brief, it explicitly acknowledged relying on the evidence it contained:

<sup>126</sup> *Lochner v New York*, 198 US 45, 57 (1905) (United States).

<sup>127</sup> Justice Harlan accepted liberty of contract and the need to scrutinise laws enacted under the police power, though he emphasised more than the majority a need to show deference to the legislature’s judgement. *ibid.*, 67–68. The main point of departure between Justice Harlan and the majority was over what conclusion to draw from the empirical evidence. His analysis on this point was somewhat more detailed than the majority, and he found: ‘There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours’ steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health, and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the State, and to provide for those dependent upon them’. *ibid.*, 72. Justice Holmes’s shorter but more famous dissent pithily questioned the doctrine of liberty of contract, stating that ‘a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire’ and that ‘[t]his case is decided upon an economic theory which a large part of the country does not entertain’. *ibid.*, 75. In several later cases, however, Holmes embraced substantive due process and even joined some of the Court’s opinions striking down laws on liberty of contract grounds. See MJ Phillips, ‘The Substantive Due Process Decisions of Mr. Justice Holmes’ (1999) 36 *American Business Law Journal* 437.

<sup>128</sup> Brief for Defendant in Error, *Lochner v New York* in *Landmark Briefs* (n 122 above).

<sup>129</sup> *Lochner v New York*, 198 US 45, 57–58 (1905).

<sup>130</sup> *ibid.*, 56.

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. *In looking through statistics regarding all trades and occupations*, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others (emphasis added).<sup>131</sup>

The Court further observed that in large cities ‘there are many buildings into which the sun penetrates for but a short time in each day’, which are occupied by the employees of many businesses, and that working prolonged hours in such conditions could be argued to be unhealthy.<sup>132</sup> If a law is valid because it promotes health in any degree whatsoever, the Court reasoned, then it would be possible for a law to prohibit lawyers’ and banks’ clerks and other employees from ‘contracting to labor for their employers more than eight hours a day’;<sup>133</sup> indeed no trade or occupation would be safe from the legislature’s ‘all-pervading power’ and ‘paternal wisdom’.<sup>134</sup> In its sanitary measures the Bakeshop Act required proper furnishing of wash rooms and set building standards on matters such as drainage and plumbing, ceiling height, and flooring; and it provided for inspections by an official with the power to order alterations. ‘Adding to all these requirements’, the Court concluded, was unnecessary for the health of bakers; the limitation of working hours was not a ‘proper, reasonable and fair provision’.<sup>135</sup> Given the lack of a substantial relationship between the hours provision and workers’ health, the Court concluded that it lacked a legitimate aim and was wrongly motivated:

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. . . . It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to, and no such substantial effect upon, the health of the employee as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees . . . in a private business, not dangerous in any degree to morals or in any real and substantial degree to the health of the employees.<sup>136</sup>

The Court avoided claiming that the hours provision bore no relationship whatsoever to worker health, observing that ‘almost all occupations more or less affect the health’ and that ‘[t]here must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty’.<sup>137</sup> This implies that the Court did not take a narrow, technical conception of necessity like the one in *Beit Sourik Village Council*. Even if the hours provision advanced health to some small degree, that would be outweighed by the interference with liberty.

Three things should be noted about the method of decision in *Lochner*. The first is that it cannot be fairly characterised as a formalist judgment. In a recent article on the

<sup>131</sup> *Lochner v New York*, 198 US 45, 59 (1905).

<sup>132</sup> *ibid*, 59.

<sup>133</sup> *ibid*, 60.

<sup>134</sup> *ibid*.

<sup>135</sup> *ibid*, 62.

<sup>136</sup> *ibid*, 64.

<sup>137</sup> *ibid*, 59.

origins of proportionality and balancing in the United States and Germany, Moshe Cohen-Eliya and Iddo Porat state:

[*Lochner*] was formalistic in two senses. First, it sought (and found) the solution to the legal issue in the meaning of one concept – liberty – through a process of logical deduction from the proper meaning of that concept. Second, it arrived at its legal conclusion without referring to the social realities of labor relations, in which workers had no meaningful ‘liberty’ to accept or reject working conditions that were, in fact, imposed on them by their employers.<sup>138</sup>

This claim focuses only on the brief part of the judgment in *Lochner* regarding the ‘labor law’ rationale, which the Court stated could be ‘dismissed in a few words’ because it was not really in dispute: the State of New York did not even contest the point. To ignore the Court’s inquiry into whether the Bakeshop Act exceeded the proper bounds of the police power, as Cohen-Eliya and Porat do, is not only to overlook the heart of the decision, but to miss a key point in the history of constitutional rights adjudication. They are not alone in missing the true significance of *Lochner* but follow a long tradition of characterising it as a formalist decision.<sup>139</sup>

The second notable thing about *Lochner* is the importance of empirical evidence in the Court’s reasoning. Although the Court did not cite directly specific studies referenced in Weismann’s brief, reading the brief together with the Court’s remark about ‘looking through statistics’ and its comparison of the health of bakers to that of workers in other trades, makes it abundantly clear that the Court read and relied on the mortality tables and other studies that Weismann compiled in the 14-page appendix to his brief. The Court also shows an awareness of the factual situation in its discussion of the Bakeshop Act’s sanitary measures as a means of protecting health, and of the impact of working conditions such as ventilation and lighting. Louis Brandeis is usually credited as the first person to bring empirical evidence into constitutional law because of the brief he submitted in *Muller v Oregon* (1908)<sup>140</sup> in defence of a law that limited the number of hours women could work in factories.<sup>141</sup> The brief had only two pages of legal argument but included an appendix of more than 100 pages of empirical evidence, and the Supreme Court cited some of the specific studies he referenced in its decision to uphold the law.<sup>142</sup> Such a brief is now known both in the United States and other countries as a Brandeis brief, but he did not invent the technique: ‘Weismann brief’ would be a more historically accurate term. *Lochner*, not *Muller*, was the first major constitutional case in which the decision of whether to strike down the law turned on scrutiny of general empirical evidence. Brandeis shrewdly responded to *Lochner* by compiling an extensive record of factual information and adapted his litigation strategy to the new paradigm of proportionality-based review and consideration of empirical research, a paradigm set in place by *Lochner* itself. The two pages of legal argument in Brandeis’s brief focused on

<sup>138</sup> M Cohen-Eliya and I Porat, ‘American Balancing and German Proportionality: The Historical Origins’ (2010) 8 *International Journal of Constitutional Law* 263, 279–80.

<sup>139</sup> See, eg, MJ Phillips, *The Lochner Court, Myth and Reality: Substantive Due Process From the 1890s to the 1930s* (Westport CT, Praeger Publishers, 2001); GE White, ‘The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations’ (1995) 70 *New York University Law Review* 576.

<sup>140</sup> *Muller v Oregon*, 208 US 412 (1908) (United States).

<sup>141</sup> See, eg, F Frankfurter, ‘Mr. Justice Brandeis and the Constitution’ in F Frankfurter (ed), *Mr. Justice Brandeis* (New Haven CT, Yale University Press, 1932) 52 (‘At a time when our constitutional law was becoming dangerously unresponsive to drastic social changes, when sterile clichés instead of facts were deciding cases, [Brandeis] insisted . . . that law must be sensitive to life’).

<sup>142</sup> Brief for Defendant in Error, *Muller v Oregon* in *Landmark Briefs* (n 122 above).



*Lochner* and cited its standards regarding necessity and the appropriate relationship between legislative ends and means.<sup>143</sup>

There is an inherent relationship between such standards of review and the use of empirical evidence. Because proportionality concerns the efficacy of means and the nature and acceptability of side-effects, questions about empirical causality are built into it. As the Canadian Supreme Court has stated, proportionality ‘is by its very nature a fact-specific inquiry’.<sup>144</sup> The European Court of Human Rights has likewise stated that in order to demonstrate conformity with the principle of proportionality, national authorities must show ‘that they based their decisions on an acceptable assessment of the relevant facts’.<sup>145</sup>

The third notable thing about *Lochner* is its close similarity to the German FCC’s use of proportionality in the *Pharmacy Case*. In both cases the courts inferred that the motive for the government measure was to interfere with economic conditions regarding employment and the market, because the evidence did not establish that the measure would effectively fulfill the putative aim of advancing public health under the police power. The level of scrutiny applied in each case was slightly different. The *Pharmacy Case* used a standard like strict scrutiny because the regulation concerned the objective conditions affecting an individual’s choice of occupation. In *Lochner* the regulation concerned the practice of an occupation, which under the *Stufentheorie* of the *Pharmacy Case* would attract minimal scrutiny. The level of scrutiny applied in *Lochner* would probably be classed as intermediate scrutiny under today’s tiered scrutiny in the US. The Court inquired whether there was a ‘direct’ relationship between means and end, and did not insist on a strict form of minimal impairment (though it took account of less restrictive alternatives such as regulations on drainage and ceiling height). Despite this difference in the level of scrutiny, it is difficult to distinguish the general method of decision in *Lochner* from the European proportionality inquiry as reflected in the *Pharmacy Case*. Both test governmental measures by inquiring into (i) the state’s aim and whether its true motives are legitimate; (ii) the suitability and necessity of the means; and (iii) whether there is an appropriate (proportionate, balanced) relationship between means and end. *Lochner* was the first US Supreme Court case to strike down a law using such an inquiry in the context of a claim that a governmental measure interfered with liberty.

It set a pattern that would be followed by the Supreme Court and other courts until the 1930s. To take just one example, in *Liggett Co v Baldridge* (1928),<sup>146</sup> the Court struck down a law in Pennsylvania that prohibited the issuance of new pharmacy licences to a corporation unless all of its stockholders were licensed pharmacists, employing an analysis similar to that of the German *Pharmacy Case*. Since this law regulated the subjective conditions – personal qualifications – for practice of a trade, it would attract intermediate scrutiny under the *Stufentheorie* of the *Pharmacy Case*. The Supreme Court likewise applied a mid-level form of scrutiny in *Liggett*. The lower court had upheld the law on the ground that there was a connection between the ownership requirement and public health because non-pharmacists would be more likely to decide what medicines to purchase on grounds of price rather than quality and this would affect the supply of

<sup>143</sup> *ibid.*

<sup>144</sup> *RJR-MacDonald, Inc v Canada* [1994] 1 SCR 311, para 133 (Canada).

<sup>145</sup> *Makhmudov v Russia* (App no 35082/04) (2008) 46 EHRR 37, para 65 (ECtHR).

<sup>146</sup> *Louis K Liggett Co v Baldridge*, 278 US 105 (United States).



medicine to the public.<sup>147</sup> The Supreme Court, however, reviewed several laws in the area, including bans on selling inferior and impure medicines, and concluded: ‘every point at which the public health is likely to be injuriously affected by the act of the owner in buying, compounding, or selling drugs and medicines is amply safeguarded’.<sup>148</sup>

In the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation owning and operating a drug-store can have no real or substantial relation to the public health, and that the act in question creates an unreasonable and unnecessary restriction upon private business. No facts are presented by the record, and, so far as appears, none was presented to the legislature which enacted the statute, that properly could give rise to a different conclusion. It is a matter of public notoriety that chain drugstores in great numbers, owned and operated by corporations, are to be found throughout the United States. They have been in operation for many years . . . If detriment to the public health thereby has resulted or is threatened, some evidence of it ought to be forthcoming.<sup>149</sup>

The Court’s reasoning and analysis are equivalent to the *Pharmacy Case* and innumerable other cases that employ the European proportionality inquiry.

Despite the depth of historical understanding that Stone Sweet and Matthews display regarding development of proportionality in Germany and parts of US history, they repeat the myth of *Lochner*’s ‘robotic formalism’<sup>150</sup> and fail to describe or appreciate its method of decision. This is a crucial flaw, for their historical study builds toward a normative argument that US courts should embrace the European proportionality inquiry. They contend that in applying minimal, rational basis review generally to economic regulations, US courts ‘abdicate’ their responsibility to protect constitutional rights.<sup>151</sup> They commend, as an example of the heightened review courts should use, a US district judge’s decision in *Williamson v Lee Optical of Oklahoma, Inc* (1955)<sup>152</sup> to strike down a law prohibiting opticians from selling services and products without the authorisation of an optometrist or ophthalmologist; and they regret its eventual reversal by the Supreme Court. What Stone Sweet and Matthews fail to recognise is that the decision in *Williamson* exactly follows the method applied in *Lochner* and *Liggett* in the use of proportionality tests and scrutiny of empirical evidence.<sup>153</sup> Neither *Lochner* nor its progeny exhibit robotic formalism. During the *Lochner* era challenges to laws such as that in *Liggett* failed more often than they succeeded. One study shows that substantive due process challenges succeeded in only 20 to 33 per cent of cases.<sup>154</sup>

If Stone Sweet’s and Matthews’s argument that US courts should embrace the European proportionality inquiry is to succeed, they must extend their historical analysis to *Lochner* and the *Lochner* era in more depth. If they think *Lochner* was wrongly decided, they need to explain in detail which aspects of it they reject rather than simply dismissing it as formalist. In endorsing the method of decision in *Williamson v Lee*

<sup>147</sup> *ibid*, 110.

<sup>148</sup> *ibid*, 113.

<sup>149</sup> *ibid*, 113–14.

<sup>150</sup> Matthews and Stone Sweet (n 2 above), 144.

<sup>151</sup> *ibid*.

<sup>152</sup> *Williamson v Lee Optical of Oklahoma, Inc*, 348 US 483 (1955) (United States).

<sup>153</sup> A Stone Sweet and J Matthews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Columbia Journal of Transnational Law* 72, 142–44.

<sup>154</sup> MJ Phillips, ‘The Progressiveness of the *Lochner* Court’ (1998) 75 *Dew University Law Review* 453, 488–89, 464–88.

*Optical of Oklahoma, Inc.*, and a greater intensity of scrutiny than rational basis for economic regulations, they have, perhaps unwittingly, effectively joined their voices to those who explicitly call for a rehabilitation of *Lochner*.<sup>155</sup>

## VI. CONCLUSION

Proportionality arose in both the United States and Germany in the late nineteenth century as a principle of limitation on the police power of the state. The initial development of proportionality in Germany was in administrative law courts, and in the United States in constitutional cases involving challenges to legislation. In both countries proportionality tests were originally seen as marking limits on legitimate state action generally rather than as a technique for adjudication of a catalogue of individual rights. The courts did not initially use the term 'proportionality' or '*Verhältnismäßigkeit*' or a formal, multi-part test, but articulated the idea in terms of necessity, excessive interference with liberty, and the relationship between means and ends.

In the United States these developments culminated in *Lochner v New York* (1905), the first major constitutional case to strike down a law on the basis of a proportionality inquiry and on scrutiny of general empirical evidence. *Lochner* deserves to be known not as the formalist decision of widespread myth, but as the case that set the paradigm for modern rights-based judicial review of legislation. Cohen-Eliya and Porat have suggested that balancing in the United States began as a reaction against *Lochner*'s formalism,<sup>156</sup> but in fact the historical development proceeds in the opposite direction. The *Lochner* era was a highpoint for general balancing during which substantive due process cases turned on weighing of interests and scrutiny of evidence, and it was difficult to predict the outcome in advance. With the arrival of tiered scrutiny, judicial balancing became formalised and structured: the decision to review a type of interference with a right under a particular tier of scrutiny does not automatically settle the outcome but goes a long way toward determining it. In the mid-twentieth century the US Supreme Court gradually superimposed the tiered scrutiny framework on the general balancing approach of *Lochner*. The shift signalled in *Carolene Products* in 1938 meant that economic liberties were no longer fundamental, and that a low level of scrutiny would apply to interference with such rights. The Court reserved higher levels of scrutiny for enumerated constitutional rights and other rights considered fundamental, and for certain suspect classifications under the Equal Protection Clause.

In the United States the tiered scrutiny framework remains an important aspect of rights adjudication, marking a significant difference from the European proportionality inquiry. But this difference is less important than it may at first seem. As shown in section IV, tiered scrutiny does not fundamentally replace general balancing but is rather a way of channelling and constraining the judicial discretion inherent in balancing tests. In *strict* and *intermediate* scrutiny courts evaluate state aims to determine whether they are *compelling* or *important*, and they assess means with regard to the burdens they impose on individual interests; as in the European proportionality inquiry, the inquiry into less

<sup>155</sup> eg, DE Bernstein, *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform* (Chicago IL, University of Chicago Press, 2011).

<sup>156</sup> M Cohen-Eliya and I Porat, 'American Balancing and German Proportionality: The Historical Origins' (2010) 8 *International Journal of Constitutional Law* 263, 280–81.

restrictive alternatives often plays a crucial role. Moreover, the tiered scrutiny framework reaches only some cases; in several areas US courts use a general balancing approach, and cases involving novel claims of right may provoke disagreement about the appropriate scrutiny level and can be difficult to classify within the traditional categories. Several justices have either fundamentally questioned strict scrutiny or called for the use of more freestanding balancing.

In Germany proportionality moved from administrative law to constitutional law in the 1950s as the Federal Constitutional Court began to use tests of necessity, minimal impairment, and balancing to determine how far the legislature could limit the individual rights set forth in the Basic Law. In the 1960s the FCC formalised this approach as the familiar multi-step proportionality inquiry which courts around the world have (in one form or another) since adopted. This multi-step formulation does not mark a fundamental distinction from the US approach to constitutional rights adjudication. The European proportionality inquiry nearly always turns on the steps of necessity or balancing (or proportionality in the narrow sense). Though these are sometimes treated as distinct steps, their logical distinctness can only be maintained by treating necessity in the narrow, technical sense described in section III. Most cases effectively turn on a single test of means–ends proportionality, like that which was used in *Lochner* and many other US cases before the Supreme Court’s adoption of tiered scrutiny in the mid-twentieth century. This general approach can be distinguished from tiered scrutiny because it allows for balancing along a sliding scale of (theoretically) infinite degrees. I have argued that judges are often averse to the unconstrained nature of general balancing, and suggested that courts could find a tiered scrutiny framework to be an attractive way of giving more structure to the European proportionality inquiry. We can perhaps see the seeds of such an approach in decisions by the German FCC such as the *Pharmacy Case* and the *Codetermination Case*, which classify certain interferences with rights, and levels of scrutiny of evidence, in a manner similar to that of US constitutional cases. I do not suggest that we will see a formal convergence of US-style tiered scrutiny and the European proportionality inquiry anytime soon. I have shown, however, that in spite of formal differences the two approaches have core similarities in (i) conceiving of constitutional rights as limited rights and in (ii) using a test of means–ends proportionality, informed by general empirical evidence and investigation of less restrictive alternatives, as a method for determining whether a state measure has permissibly interfered with a right.

## Part 3

# National Security and Human Rights



# ‘To the Serious Detriment of the Public’: Secret Evidence and Closed Material Procedures

RYAN GOSS<sup>1</sup>

## I. INTRODUCTION

IN THE SUMMER of 1861, William Lloyd visited President Abraham Lincoln at the White House. It was two months since hostilities had begun in the American Civil War, and Lloyd was eager to travel through Confederate lines in order to continue his work as ‘a publisher of railroad and steamer guides for railroads and steamers in the South’.<sup>2</sup> He needed Lincoln to approve his application for a pass, and the President knew an opportunity when he saw one. Lincoln offered Lloyd a salary of US\$200 a month plus expenses if he would become Lincoln’s personal spy in the South.<sup>3</sup> Lloyd’s mission would be ‘to proceed south and ascertain the number of troops stationed at different points in the insurrectionary states, procure plans of forts and fortifications, and gain such other information as might be beneficial’.<sup>4</sup> Lloyd and Lincoln signed a contract, and Lloyd headed south. From time to time, he sent information back to Lincoln. At the end of the War, however, Lloyd claimed that he had only been reimbursed expenses. Lloyd died in 1868, and his estate subsequently sued the United States Government before the Court of Claims.<sup>5</sup> Thus the question on appeal to the Supreme Court of the United States in *Totten v United States* was whether public policy interests forbade

the maintenance of any suit in a court of justice the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential and respecting which it will not allow the confidence to be violated.<sup>6</sup>

<sup>1</sup> Many thanks to Liora Lazarus for her thoughts on this chapter and role in co-editing this Part.

<sup>2</sup> Central Intelligence Agency, *Intelligence in the Civil War* (CIA Public Affairs, 2012) 17.

<sup>3</sup> *ibid*, 17.

<sup>4</sup> *Totten v United States*, 92 US 105 (1876) (United States).

<sup>5</sup> Central Intelligence Agency (n 2 above), 48.

<sup>6</sup> *Totten v United States*, 92 US 105, 107 (1876) (United States).

Field J, delivering the opinion of the Court, held that allowing actions to be maintained on contracts such as Lloyd's might expose 'the details of dealings with individuals and officers . . . to the serious detriment of the public'.<sup>7</sup> Moreover:

A secret service, with liability to publicity in this way, would be impossible, and, as such services are sometimes indispensable to the government, its agents in those services must look for their compensation to the contingent fund of the department employing them and to such allowance from it as those who dispense that fund may award. The secrecy which such contracts impose precludes any action for their enforcement.<sup>8</sup>

More than a century and a half after the American Civil War, there remains considerable public debate over the appropriate level of transparency that may be expected from governments and courts where competing public interests are at stake.<sup>9</sup> And, more specifically, courts around the world continue to grapple with the same central questions that Field J answered in *Totten*: how best to reconcile the principles of open justice on one hand with broader public interests on the other? How are those two elements best described and articulated? What analytical approach provides the most satisfactory reconciliation of the two? What is the appropriate division of labour between the courts and the other branches of government in cases such as these?

In this Part of *Reasoning Rights*, we approach these central questions from a variety of viewpoints, and formulate their answers with reference to a diverse body of case law. The case list for this Part draws on case law from the United Kingdom, the United States, Canada, Israel, the European Court of Justice, and the European Court of Human Rights. The cases under consideration range from Cold War era cases before the Supreme Court of the United States through to contemporary analysis from the Supreme Court of the United Kingdom.

In addition to this introduction, there are three further chapters in this Part. David Cole and Stephen Vladeck use a comparative analysis of special advocates and cleared counsel as a way into drawing out some of the broader questions involved in secret evidence. Their argument uses comparative analysis as the basis for a normative argument in favour of greater safeguards in all the relevant jurisdictions in question. In their chapter, Tom Hickman and Adam Tomkins begin with the British common law concept of 'Norwich Pharmacal jurisdiction' and expand their analysis to encompass a range of comparative case law. In doing so, they raise fascinating questions about deference and the separation of powers. Shiri Krebs draws on interviews with a range of actors in the

<sup>7</sup> *ibid*, 106–7.

<sup>8</sup> *ibid*, 106–7. As recently as 2011, the United States Supreme Court has had regard to Field J's reasoning in *Totten: General Dynamics Corp v United States* 563 US \_\_\_\_ (2011) at p 7 of Slip Opinion (United States).

<sup>9</sup> See, for example, Alan Rusbridger, 'David Miranda, schedule 7 and the danger that all reporters now face', *The Guardian* (19 August 2013): [www.theguardian.com/commentisfree/2013/aug/19/david-miranda-schedule-7-danger-reporters](http://www.theguardian.com/commentisfree/2013/aug/19/david-miranda-schedule-7-danger-reporters); Charlie Savage, 'Manning Is Acquitted of Aiding the Enemy', *The New York Times* (30 July 2013): [www.nytimes.com/2013/07/31/us/bradley-manning-verdict.html?hp&\\_r=0](http://www.nytimes.com/2013/07/31/us/bradley-manning-verdict.html?hp&_r=0); Spencer Ackerman and Dominic Rushe, 'NSA director: Edward Snowden has caused irreversible damage to US', *The Guardian* (24 June 2013): [www.theguardian.com/world/2013/jun/23/nsa-director-snowden-hong-kong](http://www.theguardian.com/world/2013/jun/23/nsa-director-snowden-hong-kong); Owen Bowcott, 'What are secret courts and what do they mean for UK justice?', *The Guardian* (14 June 2013): [www.theguardian.com/law/2013/jun/14/what-are-secret-courts](http://www.theguardian.com/law/2013/jun/14/what-are-secret-courts); Canadian Press, 'Mulcair vows to fight for transparency in face of government secrecy', *The Globe and Mail* (29 April 2012): [www.theglobeandmail.com/news/politics/mulcair-vows-to-fight-for-transparency-in-face-of-government-secrecy/article2417277/](http://www.theglobeandmail.com/news/politics/mulcair-vows-to-fight-for-transparency-in-face-of-government-secrecy/article2417277/); Peter Wonacott, 'South Africa Parliament Adopts Secrecy Bill', *The Wall Street Journal* (22 November 2011): online [www.wsj.com/article/SB10001424052970204443404577054042196590350.html](http://www.wsj.com/article/SB10001424052970204443404577054042196590350.html); and Jane Croft, 'Judge criticises superinjunction', *The Financial Times* (17 March 2011): [www.ft.com/cms/s/0/8dd1cf1c-50d2-11e0-9227-00144feab49a.html#axzz1uNsbGAG6](http://www.ft.com/cms/s/0/8dd1cf1c-50d2-11e0-9227-00144feab49a.html#axzz1uNsbGAG6).

secret evidence process, as well as case law analysis, in her chapter critiquing Israel's 'judicial management' approach to secret evidence and comparing it with the special advocate model adopted in other jurisdictions.

In this introductory chapter, the goal is to highlight and elaborate on some of the principal points of controversy in the case law, to identify similarities and differences in the cases' approaches, and to set the scene for the contributors' analysis that follows. In doing so, this chapter will reinforce this book's focus on judicial human rights reasoning, and the potential utility of comparative analysis in that reasoning, by drawing extensively on extracts from the case law. This chapter begins where many of the judgments on our case list begin: the importance of open justice.

## II. THE IMPORTANCE OF OPEN JUSTICE

The case law is replete with references to the importance of open justice as a component of natural justice. The judgments' analysis commonly begins with a statement of the importance of open justice, and it is often set up as being on the opposing side of the scales to other interests (whether they be national security, defence interests, or simply the public interest). But what do the courts mean when they refer to the importance of open justice? This section will show how the case law generally tends to focus on open justice as a right held by the applicant or accused person, but also that it discloses other ways in which open justice can manifest itself in the courts' reasoning.

In discussing open justice, the main emphasis in our cases is on the importance of affording an applicant or an accused person certain process rights. In some instances, the concern is very much an instrumentalist concern aimed at delivering the best possible decision; in others, the concern is more dignitarian. In *A v B*, Lord Brown described 'the basic principles of open justice' as including 'that there should be a public hearing at which the parties have a proper opportunity to challenge the opposing case and after which they will learn the reasons for an adverse determination'.<sup>10</sup> These basic principles were also reflected in *American-Arab Anti-Discrimination Committee v Reno*, where the US Court of Appeals held that:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.<sup>11</sup>

An analogous approach was adopted some years later in *Charkaoui (No 1)*, where the Canadian Supreme Court described the 'overarching principle of fundamental justice' as being that 'before the state can detain people for significant periods of time, it must accord them a fair judicial process'. The principle had 'a number of facets':

It comprises the right to a hearing. It requires that the hearing be before an independent and impartial magistrate. It demands a decision by the magistrate on the facts and the law. And it entails the right to know the case put against one, and the right to answer that case.<sup>12</sup>

<sup>10</sup> *A v B* [2009] UKSC 12, at [25] (United Kingdom).

<sup>11</sup> *American-Arab Anti-Discrimination Committee v Reno*, 70 F 3d 1045 at §109 (9th Cir 1995) (United States).

<sup>12</sup> *Charkaoui v Canada (Citizenship and Immigration)(No 1)* 2007 SCC 9, at [28]–[31]. See also [53] (Canada).



Subsequently, in *Al Rawi*, Lord Dyson similarly identified the principle of natural justice as one of the ‘features of a common law trial which are fundamental to our system of justice’.<sup>13</sup> Using language close to that of *Charkaoui*, Lord Dyson explained that the principle of natural justice has ‘a number of strands’:

A party has a right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance . . . Another aspect of the principle of natural justice is that the parties should be given an opportunity to call their own witnesses and to cross-examine the opposing witnesses.<sup>14</sup>

Similarly, Lord Kerr in *Al Rawi* described ‘the right to know and effectively challenge the opposing case’ as ‘a fundamental feature of the judicial process’ and as ‘an elementary and essential prerequisite of fairness’.<sup>15</sup> Indeed, Lord Kerr warned, without that right, ‘a trial between opposing parties cannot lay claim to the marque of judicial proceedings’.<sup>16</sup> In this sense, open justice becomes virtually synonymous with the right to a fair trial.

This understanding of the importance of open justice goes beyond statements of principle. As we shall see later in this chapter, acknowledgments of the open justice principle also feature in the course of the courts’ application of the law to the facts. In *Jabarin*, for example, the court acknowledged that an ex parte hearing made ‘it difficult for petitioner’s counsel to confront the claims’ made by the security services; such a hearing ‘clearly’ hampered the petitioner’s counsel.<sup>17</sup> Perhaps slightly more memorably, in *Rafeedie v Immigration and Naturalization Service*, the US Court of Appeals invoked Franz Kafka’s *The Trial* in the course of its analysis, thereby emphasising what it saw as the vital practical importance of the open justice principle:

Rafeedie – like Joseph K. in *The Trial* – can prevail before the Regional Commissioner only if he can rebut the undisclosed evidence against him, *ie*, prove that he is not a terrorist regardless of what might be implied by the Government’s confidential information. It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden.<sup>18</sup> If the courts’ analysis of the open justice principle here focuses on the rights of the applicant or accused person, we also see examples of links between open justice and the interests of actors other than the applicant.

We turn, then, to the ways in which the courts conceptualise the open justice principle as being of importance to actors other than the accused or litigating person. In a number of our cases, the courts have stressed the importance of the open justice principle to their own operations. As the court in *American-Arab Anti-Discrimination Committee v Reno* stated, ‘As judges, we are necessarily wary of one-sided process’.<sup>19</sup> Or in the slightly more confessional expression of Hugessen J, a Canadian Federal Court judge quoted in

<sup>13</sup> *Al Rawi and Others v Security Service and Others* [2011] UKSC 34, at [10]–[14] (United Kingdom).

<sup>14</sup> *ibid*, at [10]–[14].

<sup>15</sup> *ibid*, at [89].

<sup>16</sup> *ibid*, at [89], quoting Upjohn LJ in *In re K (Infants)* [1963] Ch 381.

<sup>17</sup> HCJ 5022/08, *Shawan Rateb Abdullah Jabarin v Commander of IDF Forces in the West Bank*, at [5] (Israel).

<sup>18</sup> *Rafeedie v Immigration & Naturalization Service*, 880 F 2d 506, 516 (DC Cir 1989) (United States).

<sup>19</sup> *American-Arab Anti-Discrimination Committee v Reno*, 70 F 3d 1045, at §110 (9th Cir 1995) (United States).

*Charkaoui (No 1)*, ‘We do not like this process of having to sit alone hearing only one party, and looking at the materials produced by only one party’.<sup>20</sup>

Indeed, as Krebs discusses in her chapter (nine) in this volume, the Supreme Court in *Charkaoui (No 1)* noted the importance of open justice principles to ensuring that judges and courts remain truly independent and impartial.<sup>21</sup> As the *Jabarin* court put it, when a procedure veers away from open justice and becomes an *ex parte* hearing, that hearing

hampers the court, which wants to conduct an open and effective dialogue with the representatives of both sides, and it turns the court, in the natural course of things, into the ‘representative’ of the petitioner in the *ex parte* hearing. Conducting a hearing in this way hampers everyone.<sup>22</sup>

More generally, as we shall see below, the courts also reserve for themselves a place as guardians responsible for ‘preserving an open court system’.<sup>23</sup> That having been said, we shall also see acknowledgement of negative consequences of open justice principles: notably Laws LJ in *Carnduff* referring to the danger of a transfer of ‘the difficult and delicate business of tracking and catching serious professional criminals . . . [into] the glare of the public arena of a court of justice’.<sup>24</sup>

But if we move beyond the actors directly involved in judicial proceedings, we can also identify ways in which the courts see open justice as being of more general importance. The two principal themes here are the need for the general public and the media to be able to observe court proceedings, and the related but broader argument for transparency and accountability in a democratic society. The first theme here was expressed in *Binyam Mohamed*

The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law. For that reason, every judge sitting in judgment is on trial. So it should be, and any exceptions to the principle must be closely limited. In reality very few citizens can scrutinise the judicial process: that scrutiny is performed by the media, whether newspapers or television, acting on behalf of the body of citizens. Without the commitment of an independent media the operation of the principle of open justice would be irremediably diminished.<sup>25</sup>

Later in the same decision, Lord Neuberger described ‘a very strong presumption’ that a court’s judgment ‘should be fully available *for all to see*’, and that, absent ‘good reason to the contrary, it is axiomatic that a litigant should be able to see all the reasoning of the court in his case’.<sup>26</sup> These aspects of open justice were, in turn, linked to broader notions of free speech, transparency, and accountability of executive government.

Expressed in this way, the principle of open justice encompasses the entitlement of the media to impart and the public to receive information in accordance with article 10 of the European Convention of Human Rights . . . Although expressed in wide and general terms – and perhaps inevitably so expressed – in my judgment the principles of freedom of expression, democratic

<sup>20</sup> *Charkaoui v Canada (Citizenship and Immigration)*(No 1) 2007 SCC 9, at [36] (Canada).

<sup>21</sup> *ibid*, at [37]–[42].

<sup>22</sup> HCJ 5022/08, *Shawan Rateb Abdullah Jabarin v Commander of IDF Forces in the West Bank*, at [5] (Israel).

<sup>23</sup> *Mohamed v Jeppesen Dataplan, Inc (en banc rehearing)* 614 F 3d 1070, 1081 (9th Cir 2010);, quoting *Al-Haramain Islamic Foundation, Inc v Bush*, 507 F 3d 1190, 1203 (9th Cir 2007) (United States).

<sup>24</sup> *Carnduff v Inspector Rock and Another* [2001] EWCA Civ 680, at [33]–[34] (United Kingdom).

<sup>25</sup> *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, at [38]–[42] (United Kingdom).

<sup>26</sup> *ibid*, at [134] (emphasis added).

accountability and the rule of law are integral to the principle of open justice and they are beyond question.<sup>27</sup>

Similarly, in *Charkoui (No 1)* the Canadian Supreme Court said that ‘in a constitutional democracy, governments must act accountably and in conformity with the Constitution and the rights and liberties it guarantees’.<sup>28</sup>

### III. BALANCING OPEN JUSTICE WITH OTHER PUBLIC INTERESTS

The cases considered in this section conceptualise open justice as a multi-faceted principle, the implications of which range from the mechanical elements of a fair trial right up to the broadest of democratic concerns. If open justice is on one side of the scales, how do the courts articulate and describe the public interests that lay on the opposite side of the scales? What are the interests that could be considered as potentially outweighing, in whole or in part, the principles of open justice?

In many of the cases on our list, the opposing interest is framed in terms of the responsibility of the state to protect its citizens from existential threats to national security.<sup>29</sup> Thus in *MB*, for example, Lord Hoffman intoned that ‘there can in time of peace be no public interest which is more weighty than protecting the state against terrorism’.<sup>30</sup> Using similar language, Lord Hope in *AF (No 3)* stated that:

The country must be entitled to defend itself against those who would destroy its freedoms. The first responsibility of government in a democratic society is owed to the public. It is to protect and safeguard the lives of its citizens. It is the duty of the court to do all that it can to respect and uphold that principle.<sup>31</sup>

Sometimes, as in the European Court of Human Rights’ decision in *A v United Kingdom*, the courts go so far as to make a positive finding that the nation is, indeed, imperilled:

The Court takes as its starting point that, as the national courts found and it has accepted . . . the activities and aims of the al’Qaeda network had given rise to a ‘public emergency threatening the life of the nation’. It must therefore be borne in mind that at the relevant time there was considered to be an urgent need to protect the population of the United Kingdom from terrorist attack and . . . a strong public interest in obtaining information about al’Qaeda and its associates and in maintaining the secrecy of the sources of such information.<sup>32</sup>

For many judges, the force of findings such as these is only enhanced by events taking place outside the courtroom: in *Binyam Mohamed*, Lord Judge CJ in the Court of Appeal noted that:

Terrorism is a constant threat both here and abroad. An incident in an aeroplane flying to the USA over this Christmas period demonstrates its ever present nature. In this country some terrorist plots have succeeded, with catastrophic results. They have succeeded abroad, with similar catastrophic results. Other plots have failed. And thanks to reliable intelligence and

<sup>27</sup> *ibid*, at [38]–[42].

<sup>28</sup> *Charkaoui v Canada (Citizenship and Immigration)(No 1)* 2007 SCC 9, at [1] (Canada).

<sup>29</sup> See also the definition of ‘sensitive information’ in the UK’s Justice and Security Act 2013: ‘material the disclosure of which would be damaging to the interests of national security’.

<sup>30</sup> *Secretary of State for the Home Department v MB* [2007] UKHL 46, at [54] (United Kingdom).

<sup>31</sup> *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, at [76] (United Kingdom).

<sup>32</sup> *A v United Kingdom* (App no 3455/05) [2009] ECHR 301, at [216] (ECtHR).

meticulous investigation, yet other plots have been identified and foiled before they could come to fruition. It is difficult to exaggerate the value of good intelligence and its contribution to the safety and wellbeing of the nation.<sup>33</sup>

Lord Judge went on to recognise that ‘in the modern world national safety is almost inevitably linked with the defeat of terrorism and international crime whenever and wherever they may arise’.<sup>34</sup>

In terms of taking these statements about national security and the threats posed by terrorism and linking them to notions of secrecy, Scalia J in *General Dynamics* explained that:

Many of the Government’s efforts to protect our national security are well known . . . But protecting our national security sometimes requires keeping information about our military, intelligence, and diplomatic efforts secret . . . [The Supreme Court has] recognized the sometimes-compelling necessity of governmental secrecy by acknowledging a Government privilege against court-ordered disclosure of state and military secrets.<sup>35</sup>

And at the risk of drawing Scalia J into a comparative law analysis, one may also consider the approach of the European Court of Justice in *Kadi*:

[W]ith regard to a Community measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against terrorism, overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.<sup>36</sup>

And, perhaps confronting the link more directly, Lord Mance in *Tariq* described the earlier case of *AF (No 3)* as one ‘in which it could be said that national security would be directly imperilled if secret evidence could not be used to justify imposing a control order’.<sup>37</sup>

Of course, framing the debate in terms of existential threats also raises the stakes. Thus, when Lord Hoffman in *AF (No 3)* viewed the European Court of Human Rights’ decision in *A v United Kingdom* as ‘wrong’, the terms of the debate meant that the ‘wrong’ judgment by a court was capable of ‘destroy[ing] the system of control orders which is a significant part of this country’s defences against terrorism’.<sup>38</sup> Similarly, in the much earlier US Supreme Court *Greene v McElroy* decision, a dissent by Clark J warned that ‘the present temporary debacle [that is, the effect of the majority’s decision] will turn into a rout of our internal security’.<sup>39</sup>

But the public interest identified by our cases is not always framed as being quite as weighty as an existential threat. In a number of cases, the public interest identified is one ancillary to the safety of the state, such as a concern that diplomats and ministers be able

<sup>33</sup> *R (Binyam Mohamed) v Foreign Secretary* [2010] EWCA Civ 65, at [10] (United Kingdom).

<sup>34</sup> *ibid*, at [43].

<sup>35</sup> *General Dynamics Corp v United States*, 563 US \_\_\_\_ (2011) at p 5 of Slip Opinion (United States).

<sup>36</sup> Case C-402/05 *Kadi v Council and Commission of European Communities* [2008] ECR I-6365, at [342]–[344] (ECJ).

<sup>37</sup> *Home Office v Tariq* [2011] UKSC 35, at [38] (United Kingdom). This description could be seen as either a description of counsel’s argument or as Lord Mance’s view; in any event this analysis of *AF (No 3)* is worthy of consideration.

<sup>38</sup> *Home Secretary v AF (No 3)* [2009] UKHL 28, at [70] (United Kingdom).

<sup>39</sup> *Greene v McElroy*, 360 US 474, 524 (1959) (United States).

to engage in free and frank correspondence,<sup>40</sup> a concern that intelligence sharing between allies not be compromised,<sup>41</sup> concerns over intelligence gathering,<sup>42</sup> the need to ensure that sensitive police investigations remain confidential,<sup>43</sup> the very nature of the justice system,<sup>44</sup> concerns over effective security vetting,<sup>45</sup> simply the ‘general interest of the community’,<sup>46</sup> or matters of ‘state secret’.<sup>47</sup> As will be seen, Tom Hickman and Adam Tomkins’ [chapter seven](#) in this book makes a compelling case that we should think more carefully and more critically about some frequently-invoked public and state interests.

Very often, the grand rhetorical statements about the role of the state are made in the course of articulating the balancing act between the public interest and the open justice interests of the individual concerned. In *Charkaoui (No 1)*’s analysis of section 1 of the Canadian Charter of Rights and Freedoms, the Supreme Court held that ‘protection of Canada’s national security and related intelligence sources undoubtedly constitutes a pressing and substantial objective’ before going on to consider the other aspects of the section 1 test.<sup>48</sup> Approaching the same question from a different angle, in *Al-Ghabra* Lord Hope warned that, ‘Even in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty’.<sup>49</sup>

It is to these balancing efforts that we turn next.

#### IV. EXPLORING WAYS TO BALANCE OPEN JUSTICE AND BROADER PUBLIC INTERESTS

Having established the different ways in which courts and judges deal with the open justice principle, and the ways in which they articulate the competing public interests in each case, we come to the question of how to reconcile these two sets of interests. As it was put by the European Court of Human Rights’ decision in *Chahal*, the task is to identify ‘techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice’.<sup>50</sup> Or, as the US Court of Appeals framed the question in *Jeppesen Dataplan*, ‘whether it is feasible for the litigation to proceed without the protected evidence and, if so, how’.<sup>51</sup> Frequently, such techniques are discussed using analysis that seeks to identify and assess any ‘counterbalancing’ measures put into place to minimise the disadvantage at which an individual is put.<sup>52</sup>

<sup>40</sup> *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, at [93] (United Kingdom).

<sup>41</sup> *R (Binyam Mohamed) v Foreign Secretary* [2010] EWCA Civ 65, at [10]–[13] (United Kingdom).

<sup>42</sup> *A v B* [2009] UKSC 12, at [26] (United Kingdom); *A v United Kingdom* [2009] ECHR 301, at [216]–[218] (ECtHR).

<sup>43</sup> *Carnduff v Inspector Rock and Another* [2001] EWCA Civ 680, at [50]–[51] (United Kingdom).

<sup>44</sup> *Home Secretary v AF (No 3)* [2009] UKHL 28, at [74] (United Kingdom).

<sup>45</sup> *Home Office v Tariq* [2011] UKSC 35, at [72] (United Kingdom).

<sup>46</sup> *RB (Algeria) v Home Secretary* [2009] UKHL 10, at [227] (United Kingdom). Compare the judgment of the High Court of Australia in *Assistant Commissioner Condon (Queensland Police) v Pompano Pty Ltd* [2013] HCA 7 (Australia).

<sup>47</sup> *Mohamed v Jeppesen Dataplan, Inc (en banc rehearing)*, 614 F 3d 1070, 1078 (9th Cir 2010) (United States).

<sup>48</sup> *Charkaoui v Canada (Citizenship and Immigration) (No 1)* 2007 SCC 9, at [68] (Canada).

<sup>49</sup> *Al-Ghabra v HM Treasury* [2010] UKSC 2, at [6] (United Kingdom).

<sup>50</sup> *Chahal v United Kingdom* (App no 22414/93) [1996] ECHR 54, at [131] (ECtHR).

<sup>51</sup> *Mohamed v Jeppesen Dataplan Inc (en banc rehearing)* 614 F 3d 1070, 1081 (9th Cir 2010) (United States).

<sup>52</sup> See, as but one example, *A v B* [2009] UKSC 12, at [14] (United Kingdom).

There are a number of approaches to assessing the adequacy of a counterbalancing measure. For the Canadian Supreme Court in *Charkaoui (No 1)*, the person concerned ‘must be given the *necessary* information, or a *substantial substitute* for that information must be found’ (emphasis added).<sup>53</sup> Relevant to such analysis would be whether the judge was ‘in a position to *compensate* for’ the disadvantage at which the person had been put.<sup>54</sup> In *A v United Kingdom*, the European Court of Human Rights held that if ‘full disclosure’ was not possible, Article 5 of the European Convention ‘required that the difficulties this caused were counterbalanced in such a way that each applicant *still had the possibility effectively to challenge* the allegations against him’ (emphasis added).<sup>55</sup> This question, the European Court of Human Rights said, ‘must be decided on a case-by-case basis’, but ‘where the evidence was to a large extent disclosed and the open material played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge’ the decision concerned.<sup>56</sup> For Laws LJ in *Carnduff*, the counterbalancing analysis would include consideration of whether, after any counterbalancing measures are put in place, the case can ‘be *justly tried*’ (emphasis added).<sup>57</sup> In *A v B*, the obligation was described as being ‘to provide as much information to the complainant as possible consistently with national security interests’.<sup>58</sup> In a situation where the accused or applicant does not have ‘the whole evidential basis for the basic allegation’ Baroness Hale in *MB* demanded that this be counterbalanced by ‘a *sufficient* measure of procedural protection’ (emphasis added).<sup>59</sup> For Lord Hope in *Tariq*, the question was whether the disadvantages had been ‘*sufficiently counterbalanced*’ (emphasis added).<sup>60</sup> And for some of the judges, like Lord Kerr in *Tariq*, one of the functions ‘of the counterbalancing measures is to ensure that *the very essence of the right is not impaired*’ (emphasis added).<sup>61</sup> In this context, Lord Kerr held, ‘the essence of the right must surely include the requirement that *sufficient information* about the case which is to be made against him be given to a party so that he can give meaningful instructions to answer that case’ (emphasis added).<sup>62</sup>

Perhaps necessarily, these formulations are somewhat imprecise. And of course, as *A v United Kingdom* noted, their application will depend on the facts of the case under consideration. Yet their imprecision also poses difficulty for officials and legislators trying to devise frameworks within which open justice can be reconciled with broader public interests, and for judges in later cases trying to determine whether those frameworks make provision for ‘sufficient’ counterbalancing measures. We turn next to examine several of the common methods by which governments and courts attempt to reconcile open justice rights with broader public interests, and the extent to which those methods comply with standards of sufficiency and respecting the very essence of the right.

<sup>53</sup> *Charkaoui v Canada (Citizenship and Immigration)*(No 1) 2007 SCC 9, at [61]–[64] (Canada).

<sup>54</sup> *ibid*, at [61]–[64].

<sup>55</sup> *A v United Kingdom* [2009] ECHR 301, at [218] (ECtHR).

<sup>56</sup> *ibid*, at [220].

<sup>57</sup> *Carnduff v Inspector Rock and Another* [2001] EWCA Civ 680, at [36] (United Kingdom)..

<sup>58</sup> *A v B* [2009] UKSC 12, at [30]–[31] (United Kingdom).

<sup>59</sup> *Home Secretary v MB* [2007] UKHL 46, at [74]. (Note that in *AF No 3* this was described at [17] as very ambiguous).

<sup>60</sup> *Home Office v Tariq* [2011] UKSC 35, at [76] (United Kingdom).

<sup>61</sup> *ibid*, at [118]–[119].

<sup>62</sup> *ibid*, at [118]–[119].



As was seen in the American Civil War case of *Totten*, in a number of instances, courts reconcile the two competing sets of interests by forcing the litigation to be discontinued. Typically employed in instances where a non-government actor is bringing an action against a government actor, this method is the result of a court reasoning that no counterbalancing measure is capable of ‘saving’ the litigation: if it were to continue, damage would necessarily be done to the broader public interest. For example, in *General Dynamics*, Scalia J for the US Supreme Court discounted possible counterbalancing measures as unacceptably risky:

Every document request or question to a witness would risk further disclosure, since both sides have an incentive to probe up to the boundaries of state secrets. State secrets can also be indirectly disclosed. Each assertion of the privilege can provide another clue about the Government’s covert programs or capabilities . . . For instance, the fact that the Government had to continue asserting the privilege after granting petitioners access to B-2 and F-117A program information suggests it had other, possibly covert stealth programs in the 1980’s and early 1990’s.<sup>63</sup>

Ultimately, the *General Dynamics* Court adopted the ‘traditional course’ under US common law, which was to ‘leave the parties where they stood when they knocked on the courthouse door’.<sup>64</sup> A similar process of reasoning through the practicality of the litigation in prospect was undertaken by the US Court of Appeals in *Binyam Mohamed v Jeppesen Dataplan*.<sup>65</sup> The chapter by Hickman and Tomkins explores this jurisprudence and describes an ‘eye-watering’ approach to striking out cases involving claims of gross human rights violations without independent judicial assessment of the public interest. In the United Kingdom, Laws LJ in *Carnduff* warned that ‘a case which can only be justly tried if one side holds up its hands cannot, in truth, be justly tried at all’.<sup>66</sup> Laws LJ identified practical concerns that may be added to those of Scalia J:

In my judgment the very bringing of such a claim as this makes injustice, at least if the claim is disputed in good faith (and we are surely entitled to assume that that is the position here). If it is allowed to proceed at all, an expectation is generated that somehow or other a means may be found to try it consistently with the public interest; the parties are bound to attempt to configure their competing cases so as to get in evidence in the face of the obvious public interest difficulties; at once the very process of litigation, supposed to be even-handed, is gravely distorted. The basis on which either party’s case is pleaded . . . is subject to pressures which should be irrelevant, and there will be pressures to compromise of a kind which ought not to be brought to bear. All this, in my judgment, tends to compromise the business of doing justice.<sup>67</sup>

Considering *Carnduff* a decade later, Lord Dyson in *Al Rawi* noted that ‘cases such as *Carnduff* are a rarity’ and that such cases ‘do not pose a problem on a scale which provides any justification . . . for making a fundamental change to the way in which litigation is conducted in our jurisdiction’.<sup>68</sup>

In many of the cases we consider, however, forced discontinuation of the litigation was simply not an option. In litigation brought by a government actor against a non-

<sup>63</sup> *General Dynamics Corp v United States*, 563 US \_\_\_\_ (2011) at p 8 of Slip Opinion (United States).

<sup>64</sup> *ibid*, at p 9 of Slip Opinion.

<sup>65</sup> *Mohamed v Jeppesen Dataplan, Inc (en banc rehearing)* 614 F3d 1070, 1082-1083 (9th Cir 2010) (United States).

<sup>66</sup> *Carnduff v Inspector Rock and Another* [2001] EWCA Civ 680, at [36].

<sup>67</sup> *ibid*, at [37].

<sup>68</sup> *Al Rawi and Others v Security Service and Others* [2011] UKSC 34, at [50] (United Kingdom).

government actor, particularly in the context of quasi-criminal proceedings or proceedings motivated by the sorts of public interest concerns we considered above, discontinuing the proceedings could pose grave problems for the government. And so, governments and courts have sought to devise mechanisms that will allow the proceedings to continue while respecting both the broader public interests at stake and the individual's open justice rights. Most often, these mechanisms have involved some form of closed material procedure and some form of cleared counsel or special advocate: a security-cleared lawyer independent from the individual's legal team but tasked with acting on the individual's behalf during security-sensitive stages of the proceedings from which the individual is excluded. Or, as it was described in *MB*,

Provision is made for the appointment of a special advocate whose function is to represent the interests of a relevant party . . . but who may only communicate with the relevant party before closed material is served upon him, save with permission of the court.<sup>69</sup>

Of the judgments considered in our case list, one of the first references to closed material procedures of this sort came in *Chahal*. In that case the European Court of Human Rights drew on comparative law in considering the options open to governments and legislatures when grappling with how to craft a policy that correctly balanced open justice with broader public interest concerns:

The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved. The Court attaches significance to the fact that . . . in Canada a more effective form of judicial control has been developed in cases of this type . . .

Under the Canadian Immigration Act 1976 . . . a Federal Court judge holds an in camera hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the State's case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant.<sup>70</sup>

The Court held that the Canadian system 'illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice'.<sup>71</sup> Special advocate closed material procedures of this sort have proliferated in the United Kingdom after *Chahal*, and have continued to operate in Canada.<sup>72</sup> Interestingly, as David Cole and Stephen Vladeck note in their chapter (seven) in this Part, the development of the case law in this area has been characterised by considerable comparative law analysis; Cole and Vladeck take that comparative analysis

<sup>69</sup> *Home Secretary v MB* [2007] UKHL 46, at [27] (United Kingdom).

<sup>70</sup> *Chahal v United Kingdom* (App no 22414/93) [1996] ECHR 54, at [131], [144] (ECtHR).

<sup>71</sup> *ibid*, at [131].

<sup>72</sup> Indeed, proposed United Kingdom legislation would expand the availability of closed material procedures dramatically and also broaden the range of information capable of triggering such procedures: see Justice and Security Bill 2012–13 (passed through the final stage of the House of Lords' consideration on 28 March 2013 and awaiting Royal Assent at the time of writing) and the *Justice and Security Green Paper* (October 2011).



further and call for greater safeguards by noting the ways in which safeguards adopted in one jurisdiction could be borrowed and implemented by other jurisdictions.<sup>73</sup>

Cole and Vladeck's call for greater safeguards reflects the fact that the operation of the special advocate system has been subject to significant criticisms, particularly in some of the British cases. In *Al-Rawi*, Lord Dyson reflected on its weaknesses:

The closed material procedure excludes a party from the closed part of the trial. He cannot see the witnesses who speak in that part of the trial; nor can he see closed documents; he cannot hear or read the closed evidence or the submissions made in the closed hearing; and finally he cannot see the judge delivering the closed judgment nor can he read it.

Can all of these flaws be cured by a special advocate system? No doubt, special advocates can mitigate these weaknesses to some extent and in some cases the litigant may be able to add little or nothing to what the special advocate can do. For example, this will be the case where the litigant has no knowledge of the matters to which the closed material relates and can give no instructions which will enable the special advocate to perform his function more effectively. But in many cases, the special advocate will be hampered by not being able to take instructions from his client on the closed material. A further problem is that it may not always be possible for the judge (even with the benefit of assistance from the special advocate) to decide whether the special advocate will be hampered in this way.<sup>74</sup>

Or, in the words of a 2007 report of the British Parliament's Joint Committee on Human Rights, excerpted in Lord Dyson's judgment:

After listening to the evidence of the Special Advocates [given to the Joint Committee's inquiry], we found it hard not to reach for well worn descriptions of it as 'Kafkaesque' or like the Star Chamber. The Special Advocates agreed when it was put to them that, in the light of the concerns they had raised, 'the public should be left in absolutely no doubt that what is happening . . . has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.' Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against the basic notions of fair play as the lay public would understand them.<sup>75</sup>

Such robust criticism raises real doubts over the extent to which closed material procedures successfully reconcile the principles of open justice with broader public interest concerns. In her chapter, Shiri Krebs draws links between these concerns of the United Kingdom's special advocates and those of lawyers involved in proceedings under the Israeli judicial management model. In doing so, Krebs raises questions about both the judicial management model and the special advocate model.

Several years before *Al Rawi*, in a judgment dissenting on the relevant point in *A v Home Secretary (No 2)*, Lord Bingham had noted the disadvantageous position of the special advocate when compared with government counsel, for whom the government's resources are available: 'special advocates have no means or resources to investigate'.<sup>76</sup> In the majority in the same case, however, Lord Rodger did not regard the closed material procedure in quite such a negative light. He noted that special advocates would be able to 'present information provided by international organisations or derived from

<sup>73</sup> This comparativism is also evident in other jurisdictions. See, eg, *Condon v Pompano Pty Ltd* [2013] HCA 7, at [55]–[65] French CJ (Australia).

<sup>74</sup> *Al Rawi and Others v Security Service and Others* [2011] UKSC 34, at [35]–[36] (United Kingdom).

<sup>75</sup> *ibid*, at [37]. See also *Home Office v Tariq* [2011] UKSC 35.

<sup>76</sup> *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, at [55]–[59] (United Kingdom).

books and articles to paint the picture of conditions in the country concerned', before stating:

Of course, the suspects themselves will not be able to assist the special advocate in finding more information during the closed hearing. But that is not so great a disadvantage as may appear at first sight, since it is in any event unlikely that they would be able to cast light on the specific circumstances in which a particular statement had been taken by the overseas authorities. So, usually at least, any investigation will have to be done by others. On behalf of the Home Secretary, Mr Burnett QC explained how those in the relevant departments who were preparing a case for a SIAC hearing would sift through the material, on the lookout for anything that might suggest that torture had been used. The Home Secretary accepted that he was under a duty to put any such material before the Commission. With the aid of the relevant intelligence services, doubtless as much as possible will be done. And SIAC itself will wish to take an active role in suggesting possible lines of investigation.<sup>77</sup>

One may well wonder about the extent to which such reliance on the security services is consistent with some of the loftier statements about open justice considered earlier in this chapter.

But while the special advocate system has been subject to significant criticism, there remains a sense that the system provides a counterbalancing mechanism that is, to put it in the vernacular, better than nothing.<sup>78</sup> As the Canadian Supreme Court said in *Charkaoui* (No 1) when considering legislation lacking a special advocate procedure:

Why the drafters of the legislation did not provide for special counsel to objectively review the material with a view to protecting the named person's interest, as was formerly done for the review of security certificates by SIRC and is presently done in the United Kingdom, has not been explained. The special counsel system may not be perfect from the named person's perspective, given that special counsel cannot reveal confidential material. But, without compromising security, it better protects the named person's [Charter] interests.<sup>79</sup>

Even accepting the special advocate closed material procedure on its merits, there remains uncertainty in some of the case law over how best to operate such a procedure. In seeking to ameliorate some of the disadvantages inherent in a closed material procedure, some of the cases on our list have imposed qualifications on how closed material is used. Here, we consider two related categories of qualification over which there is uncertainty: the so-called 'gisting' requirement, and the extent to which material must be disclosed even if it 'makes no difference' to the applicant or accused person's case.

The first area of uncertainty relates to gisting. This is the notion that even if the closed material cannot be provided to the individual concerned in full, or in unadulterated form, it should be summarised or provided in redacted form. Cole and Vladeck's chapter provides thoughtful analysis of different ways that the different jurisdictions seek to accomplish this goal. Thus, for example, in explaining the role of the judge in closed proceedings in the national security context, the Canadian Supreme Court in *Charkaoui* (No 2) stated:

The designated judge, who will have access to all the evidence, will then exclude any evidence that might pose a threat to national security and summarize the remaining evidence – which he

<sup>77</sup> *ibid*, at [142]–[143].

<sup>78</sup> The perceived advantages of this sort of counterbalancing mechanism are considered in the Israeli context by Krebs in [chapter nine](#) of this volume.

<sup>79</sup> *Charkaoui v Canada (Citizenship and Immigration)*(No 1), 2007 SCC 9, at [86] (Canada).

or she will have been able to check for accuracy and reliability – for the named person . . . In short, the judge must filter the evidence he or she has verified and determine the limits of the access to which the named person will be entitled at each step of the process, both during the review of the validity of the certificate and at the detention review stage . . . The designated judge then provides non-privileged information to the named person, as completely as the circumstances allow.<sup>80</sup>

A similar discussion took place in *Al-Odah v United States*, where the Court of Appeals left open the possibility that ‘alternatives to disclosure’ might ‘effectively substitute for unredacted access’; this was a matter for the District Court to address on remand. In general terms, such alternatives might include ‘a statement admitting relevant facts that the specific classified information would tend to prove’ or ‘a summary of the specific classified information’.<sup>81</sup>

The gisting requirement has generated considerable recent debate in the United Kingdom, as is reflected in a number of our selected judgments, and in debate over what became section 8 of the Justice and Security Act 2013. In considering the special advocate procedure in *A v United Kingdom*, the European Court of Human Rights stated that:

the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with *sufficient information* about the allegations against him to enable him to give effective instructions to the special advocate (emphasis added).<sup>82</sup>

This warning from the European Court was taken to heart in the House of Lords’ decision in *AF (No 3)*. Lord Bingham held that the European Court had

made clear that non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him, at least where he is at risk of consequences as severe as those normally imposed under a control order.<sup>83</sup>

Similarly, Lord Hope regarded the ‘core principle’ as being that a person subject to a control order must be ‘given sufficient information to enable his special advocate effectively to challenge the case that is brought against him’.<sup>84</sup> In the more recent decision of the UK Supreme Court in *Tariq*, however, the gisting requirement was enforced less rigorously in a security-vetting case where the applicant’s liberty was not at stake. As Lord Hope put it:

This is an entirely different case from . . . *AF (No 3)*. There the fundamental rights of the individual were being severely restricted by the actions of the executive. Where issues such as that are at stake, the rule of law requires that the individual be given sufficient material to enable him to answer the case that is made against him by the state. In this case the individual is not faced with criminal proceedings against him or with severe restrictions on personal liberty. This is a civil claim and the question is whether Mr Tariq is entitled to damages . . .

<sup>80</sup> *Charkaoui v Canada (Citizenship and Immigration)*(No 2) 2008 SCC 38, at [62]–[64] (Canada).

<sup>81</sup> *Al Odah v United States* 559 F 3d 539, 547 (DC Cir 2009) (United States). These examples are an analogy drawn from proceedings under the Classified Information Procedures Act – 18 USC App III §6(c)(1).

<sup>82</sup> *A v United Kingdom* [2009] ECHR 301, at [220] (United Kingdom).

<sup>83</sup> *Home Secretary v AF (No 3)* [2009] UKHL 28, at [65] (United Kingdom).

<sup>84</sup> *ibid*, at [85]. See also Lady Hale at [101].

*There cannot, after all, be an absolute rule that gisting must always be resorted to whatever the circumstances.* There are no hard edged rules in this area of the law. As I said at the beginning, the principles that lie at the heart of the case pull in different directions. It must be a question of degree, balancing the considerations on one side against those on the other, as to how much weight is to be given to each of them. I would hold that, given the nature of the case, the fact that the disadvantage to Mr Tariq that the closed procedure will give rise to can to some extent be minimised and the paramount need to protect the integrity of the security vetting process, the balance is in favour of the Home Office (emphasis added).<sup>85</sup>

Lord Kerr dissented strongly from this view, holding that ‘there is no principled basis on which to draw a distinction between the essence of the right to a fair trial based on the nature of the claim that is made’.<sup>86</sup> The effect of the majority judgment in *Tariq*, however, is to create uncertainty over when, precisely, gisting will be required. While Lord Hope holds that this is an area of law without hard edges, his judgment offers little certainty or guidance or for those who come into contact with its soft edges.

The second, and related, area of uncertainty is whether closed material must be disclosed or gisted even if that material would ‘make no difference’ to the case of the individual concerned. In its decision in *Ahmad*, for example, the Canadian Supreme Court stated that:

Lack of disclosure in this context cannot necessarily be equated with the denial of the right to make full answer and defence resulting in an unfair trial. There will be many instances in which non-disclosure of protected information will have no bearing at all on trial fairness or where alternatives to full disclosure may provide assurances that trial fairness has not been compromised by the absence of full disclosure.<sup>87</sup>

The issue has also received considerable attention in the British courts. The possibility of a narrow ‘makes no difference’ exception to general disclosure and gisting requirements was envisaged by Lord Brown in his judgment in *MB*:

There may perhaps be cases, wholly exceptional though they are likely to be, where, despite the best efforts of all concerned by way of redaction, anonymisation, and gisting, it will simply be impossible to indicate sufficient of the Secretary of State’s case to enable the suspect to advance any effective challenge to it. *Unless in these cases the judge can nevertheless feel quite sure that in any event no possible challenge could conceivably have succeeded* (a difficult but not, I think, impossible conclusion to arrive at . . .), he would have to conclude that the making . . . of an order would indeed involve significant injustice to the suspect.<sup>88</sup>

A broader exception was countenanced in *RB (Algeria)*, where the undisclosed material related to the applicant’s past actions and their consequences in the applicant’s home country, to which deportation was proposed:

It is true that, if that deportee will be at real risk of a violation of his human rights on return to his own country, this is likely to be because of facts that are personal to him. The difference is that he will normally be aware of those facts and indeed he will be relying on them to establish the risk that he faces on his return. His situation is not that of an individual who is unaware of the case that is made against him. Indeed, so far as safety on return is concerned, the State does not have to make out a case against the deportee.<sup>89</sup>

<sup>85</sup> *Home Office v Tariq* [2011] UKSC 35, at [81]–[83] (United Kingdom).

<sup>86</sup> *ibid.*, at [134].

<sup>87</sup> *R v Ahmad* 2011 SCC 6, at [30] (Canada).

<sup>88</sup> *Home Secretary v MB* [2007] UKHL 46, at [90] (United Kingdom) (emphasis added).

<sup>89</sup> *RB (Algeria) v Home Secretary* [2009] UKHL 10, at [95].

Thus, it was said, ‘ignorance on the part of the deportee of the closed material is unlikely to prejudice the conduct of his case’.<sup>90</sup> The matter was put similarly by Lord Brown, who noted that the applicant was ‘making a case against the state to which it is proposed to expel him’ and that withholding material used by the government in response to his case was ‘less prospectively damaging to his cause than where (as in a control order case) he may be left entirely in the dark as to why he is alleged to constitute a terrorist threat’.<sup>91</sup>

In *AF (No 3)*, Lord Phillips gave some consideration to the ‘makes no difference’ principle. In doing so, he quoted the judgment of Sedley LJ in the Court of Appeal, thus:

‘[I]t is in my respectful view seductively easy to conclude that there can be no answer to a case of which you have only heard one side. There can be few practising lawyers who have not had the experience of resuming their seat in a state of hubristic satisfaction, having called a respectable witness to give apparently cast-iron evidence, only to see it reduced to wreckage by ten minutes of well-informed cross-examination or convincingly explained away by the other side’s testimony. Some have appeared in cases in which everybody was sure of the defendant’s guilt, only for fresh evidence to emerge which makes it clear that they were wrong. As Mark Twain said, the difference between reality and fiction is that fiction has to be credible. In a system which recruits its judges from practitioners, judges need to carry this kind of sobering experience to the bench. It reminds them that you cannot be sure of anything until all the evidence has been heard, and that even then you may be wrong. It may be, for these reasons, that the answer to Baroness Hale’s question – what difference might disclosure have made? – is that you can never know’.<sup>92</sup>

Lord Philips went on to acknowledge that there was some weight to the ‘makes no difference’ argument, but concluded that there were ‘strong policy considerations that support a rule that a trial procedure can never be considered fair if a party to it is kept in ignorance of the case against him’:

The first is that there will be many cases where it is impossible for the court to be confident that disclosure will make no difference. Reasonable suspicion may be established on grounds that establish an overwhelming case of involvement in terrorism-related activity but, because the threshold is so low, reasonable suspicion may also be founded on misinterpretation of facts in respect of which the controlee is in a position to put forward an innocent explanation. A system that relies upon the judge to distinguish between the two is not satisfactory, however able and experienced the judge. Next there is the point made . . . in respect of the feelings of resentment that will be aroused if a party to legal proceedings is placed in a position where it is impossible for him to influence the result. The point goes further. Resentment will understandably be felt, not merely by the controlee but by his family and friends, if sanctions are imposed on him on grounds that lead to his being suspected of involvement in terrorism without any proper explanation of what those grounds are. Indeed, if the wider public are to have confidence in the justice system, they need to be able to see that justice is done rather than being asked to take it on trust.<sup>93</sup>

These policy arguments bear close resemblance to some of the broadest of the open justice principles discussed earlier in this chapter.

<sup>90</sup> *ibid.*, at [100].

<sup>91</sup> *ibid.*, at [256].

<sup>92</sup> *Home Secretary v AF (No 3)* [2009] UKHL 28, at [36], quoting *Home Secretary v AF (No 3)* [2008] EWCA Civ 1148, at [113].

<sup>93</sup> *Home Secretary v AF (No 3)* [2009] UKHL 28, at [63].

## V. CONCLUSION

In concluding this chapter, we note one final way in which the cases on our list may be compared and contrasted: the ways in which they deal with separation of powers and allocation of responsibilities between different branches of government. In some of the cases, such as *Binyam Mohamed*, courts demonstrate some deference to the view of the executive government:

While there are strong reasons for scepticism, I accept that the Foreign Secretary genuinely believes, and has some grounds for believing, what he has stated in the three certificates, namely that the flow of information from foreign Government intelligence services to the [Security Services] could be curtailed if the redacted paragraphs are published, because that publication would be regarded by those Governments as an unjustifiable breach of the control principle . . .

We are here concerned with a possible risk to the flow of information that may affect national security, which is an issue . . . on which the Foreign Secretary's opinion is both far more informed and experienced than that of any judge, and is supported by material, not merely from the US Government, but from the White House and the Secretary of State.<sup>94</sup>

In others, however, such as *Arab-American Anti-Discrimination Committee v Reno*, the courts refuse to so defer:

We cannot in good conscience find that the President's broad generalization regarding a distant foreign policy concern and a related national security threat suffices to support a process that is inherently unfair because of the enormous risk of error and the substantial personal interests involved.<sup>95</sup>

And in another group of cases – including *Jabarin*, *Greene v McElroy*, and *Al-Rawi* – the courts refuse to take steps in their judgments that they believe may properly be taken only by the executive or legislature.<sup>96</sup> The Hickman and Tomkins chapter now explores these questions in considerable depth.

In thinking about secret evidence procedures, the chapters in this Part also raise interesting, and sometimes troubling, methodological questions. Building on the open justice considerations outlined above, these chapters reveal something of the difficulty faced by citizens, lawyers, and academics seeking to scrutinise the operation of secret evidence proceedings. Lord Judge CJ in *Binyam Mohamed* said that 'every judge sitting in judgment is on trial', but noted that in 'reality very few citizens can scrutinise the judicial process'.<sup>97</sup> The task of scrutiny is made significantly harder when dealing with closed material proceedings. As Sedley LJ put it in the Court of Appeal,

'[i]t may be . . . that the answer to [the] question – what difference might disclosure have made? – is that you can never know.'<sup>98</sup>

<sup>94</sup> *R (Binyam Mohamed) v Foreign Secretary* [2010] EWCA Civ 65, at [170], [174] (United Kingdom).

<sup>95</sup> *American-Arab Anti-Discrimination Committee v Reno*, 70 F 3d 1045, at §115 (9th Cir 1995) (United States).

<sup>96</sup> *Al Rawi and Others v Security Service and Others* [2011] UKSC 34, at [74]; *Greene v McElroy* 360 US 474, 508 (1959); HCl 5022/08, *Shawan Rateb Abdullah Jabarin v Commander of IDF Forces in the West Bank* at [5].

<sup>97</sup> *R (Binyam Mohamed) v Foreign Secretary* [2010] EWCA Civ 65, at [38]–[42] (United Kingdom).

<sup>98</sup> *Home Secretary v AF (No 3)* at [36], citing *Secretary of State for the Home Department v AF (No 3)* (CA) [2008] EWCA Civ 1148, at [113].

For academics and lawyers working in this area, therefore, it is important to reflect on how best to assess the work being done behind closed doors. To what extent can academics and lawyers, as members of a critical legal community, adequately scrutinise proceedings that are closed to the public and whose secrecy is ensured by national security laws? If critics are unable to see the information supporting the state's national security arguments, can their criticism truly engage with what is at stake in any closed material proceedings? To what extent must any analysis of closed material procedures necessarily be caveated, and to what extent might the difficulty of scrutiny provide an argument against the closed material procedures themselves? These questions, whether implicitly or expressly, run through the chapters in this Part and through many of the cases considered in it.

Whether by telling us something about the courts' sense of the separation of powers, or by demonstrating the breadth of meanings encompassed in the open justice principle, or by exploring how infringements of rights may be counterbalanced, this introductory chapter has begun to demonstrate the wealth of debates raised by the secret evidence case law. More than a century and a half after Lincoln and Lloyd concluded their contract in the White House, courts continue to grapple with how best to resolve the competing demands of open justice and national security interests. In the remainder of this Part, our contributors develop challenging and thought-provoking arguments that put these very old questions in a new light as they consider how a variety of diverse jurisdictions adjudicate these human rights controversies in the modern context.



# *National Security Law and the Creep of Secrecy: A Transatlantic Tale*

TOM HICKMAN AND ADAM TOMKINS

## I. INTRODUCTION

THE JUSTICE AND Security Act 2013 was passed by the United Kingdom Parliament in April 2013.<sup>1</sup> It is a highly controversial measure, mainly because of the way in which it extends the use of ‘closed material procedure’ and special advocates across a range of civil proceedings. It heralds a new era in national security law in the United Kingdom.<sup>2</sup>

Our discussion will bring us to the issue of closed material procedure (CMP), and we hope to shed light on it, but we approach it via a different aspect of the legislation, which will be our focus: namely, the Act’s provisions to curb the courts’ *Norwich Pharmacal* jurisdiction in the context of national security and international relations.<sup>3</sup> The *Norwich Pharmacal* jurisdiction enables the courts in England and Wales to order persons who are ‘mixed up’ in the wrongdoing of others to disclose documents necessary for other legal proceedings. Section 17 of the Justice and Security Act abolishes this jurisdiction in relation to material held by or derived from intelligence agencies and prohibits its exercise in relation to other national security or international relations material, upon the issue of a certificate by the Secretary of State.

This reform was highly controversial when the Justice and Security Bill was introduced into Parliament in 2012 because of the role played by *Norwich Pharmacal* in one of the most politically-heated cases of recent times, relating to the extraordinary rendition of a UK resident, Binyam Mohamed. During the passage of the Bill, however, the matter lost its sting due to a volte-face by the English Court of Appeal, but the tale is critical to understanding the Justice and Security Act more generally, including the

<sup>1</sup> Adam Tomkins advised the House of Lords Constitution Committee on the Justice and Security Bill in 2012–13. Tom Hickman acted as junior counsel in several of the cases mentioned in this paper, including before the Court of Appeal in the *Binyam Mohamed* case. As Fellows of the Bingham Centre for the Rule of Law, they were also both involved in the Bingham Centre’s work on the Justice and Security reforms in 2011–13. They write here in a personal capacity by reference to the public record.

<sup>2</sup> For an account, see A Tomkins, ‘Justice and Security in the United Kingdom’ (2014) 47 *Israel Law Review* (forthcoming). In 2011 the UK Supreme Court ruled that the courts could not extend the use of closed material procedure in this way: to make such an inroad into the principles of open and natural justice would require legislation: *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531 (United Kingdom).

<sup>3</sup> *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 (United Kingdom).



provisions relating to closed material procedure. Moreover, it is a fascinating example both of transatlantic influence in law- and policy-making and of the delicate interplay between courts, governments and parliamentarians in the matter of national security, international relations and keeping secrets.

## II. THE *NORWICH PHARMACAL* JURISDICTION IN ENGLISH LAW

The *Norwich Pharmacal* jurisdiction is a means whereby a party may request the court to order the disclosure of documents or information where there has been wrongdoing by a third party and where the information is required in order to seek justice. The seminal judgment was a case about breach of intellectual property rights, but it had a public law dimension, as the defendants were the Customs and Excise Commissioners who held information about importers of allegedly counterfeit goods, and unwittingly became involved in their importation by virtue of their statutory responsibilities. The House of Lords held that the Commissioners could be made to disclose the documents. In a famous passage, Lord Reid stated:<sup>4</sup>

[I]f through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did . . . [J]ustice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.

Section 17(2) of the Justice and Security Act 2013 prevents the court from exercising its *Norwich Pharmacal* jurisdiction in any case concerning the disclosure of ‘sensitive information’. The Act gives a very wide definition to sensitive information, covering any information held by an intelligence service, obtained from or held on behalf of an intelligence service or derived from such information, or even information relating to an intelligence service. This clearly encompasses information beyond that which it is necessary to keep secret. In addition, the Secretary of State may certify other information as non-disclosable if it would cause damage to the interests of national security or international relations.<sup>5</sup> The bar on disclosure in such ‘sensitive’ cases is absolute: it is not subject to any balancing test that would take into account the interests in favour of disclosure. Even in a case alleging gross human rights violations, such as torture or unlawful killing, the jurisdiction of the court to order disclosure is removed. It was the use of the jurisdiction precisely in such a context, and the court’s preparedness to balance harm to national security and international relations against the compelling interests in disclosure, which ignited international political controversy and provoked the legislative reform.

<sup>4</sup> *Norwich Pharmacal*, *ibid* 175.

<sup>5</sup> Justice and Security Act 2013 s 17(3)(e), (4), (5). Section 18 provides for a limited review of a certificate, as to whether the statutory conditions for certification are met, applying ‘the principles which would be applied in judicial review proceedings’.

## III. THE BINYAM MOHAMED CASE

The case which sparked the political firestorm was *Binyam Mohamed*.<sup>6</sup> In 2008 Mr Mohamed, invoking the *Norwich Pharmacal* jurisdiction, sought the private disclosure to his security-cleared US counsel of such material as the UK Government had in its possession relating to his detention and torture by or on behalf of the United States. Mr Mohamed was an Ethiopian national who had been resident in the United Kingdom since 1994. As the Divisional Court held, he was unlawfully detained in Pakistan in April 2002. After suffering serious mistreatment there, he was flown incommunicado to Morocco by the CIA to a 'black site' where he was subjected to appalling torture. From there he was taken to Afghanistan and held for over three months in the notorious 'dark prison' in Kabul, being subjected to some of the worst imaginable conditions, before being taken to Bagram airbase and then to Guantanamo Bay.<sup>7</sup> Whilst the British Government strongly contested the degree to which they had had knowledge of the detention and the mistreatment of Mr Mohamed, his general account was not challenged and substantial parts were corroborated by evidence served by the Government. In a separate case, which plays a part later in this tale, the US District Court for the District of Columbia found Mr Mohamed's account proven. It stated:<sup>8</sup>

Binyam Mohamed's trauma lasted for two long years. During that time, he was physically and psychologically tortured. His genitals were mutilated. He was deprived of sleep and food. He was summarily transported from one foreign prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell. All the while, he was forced to inculcate himself and others in various plots to imperil Americans.

In May 2008, Mr Mohamed was charged under the Military Commissions Act of 2006 on the basis of confessions made whilst he was detained in Bagram and at Guantanamo Bay. His criminal defence was that those statements had been made under duress, whilst being subjected to cruel, inhuman or degrading treatment or torture, and were untrue. However, the evidence for this was principally his own, and the US authorities denied engaging in torture. Since it was clear that the UK intelligence services had been involved to some degree in his interrogations – in particular, he was interrogated by the British in Pakistan and questions were put to him subsequently which originated from UK intelligence – he sought corroborating documents under the *Norwich Pharmacal* jurisdiction.

The Divisional Court recognised that the case sought to apply the *Norwich Pharmacal* jurisdiction in novel circumstances. The court analysed *Norwich Pharmacal* as comprising five elements: (1) was there wrongdoing?, (2) were the UK Government, however innocently, involved in the wrongdoing?, (3) was the information necessary in order for the claimant to seek redress?, (4) was the information sought within the scope of the

<sup>6</sup> In total six judgments were delivered by the Divisional Court and two judgments in the Court of Appeal. The first, and most important, of the Divisional Court's judgments is *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579. The Court of Appeal judgments are *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2010] EWCA Civ 65 and [2010] EWCA Civ 158, reported together in the official law reports at [2011] QB 218.

<sup>7</sup> [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579, at [10]–[41] (United Kingdom).

<sup>8</sup> *Farhi Saeed Bin Mohammed v Obama*, 704 F Supp 2d 1, 26–27 (2009) (G Kessler District Judge) (United States).

available relief?, and (5) should the court exercise its discretion in favour of granting relief? Only if all these elements were satisfied would disclosure be ordered.

The Divisional Court handed down judgment in August 2008. As to the first issue, it was accepted by the Government that the claimant had established an arguable case that ‘after being subject[ed] to torture and cruel, inhuman or degrading treatment in Pakistan, he was unlawfully rendered from Pakistan to Morocco by the US authorities’ and that ‘whilst in Morocco he was subject to . . . torture during his interrogation there by or on behalf of the US authorities’. In its judgment the court ruled that in the light of this concession it was not necessary for it to ‘determine whether there was in fact any arguable wrongdoing by or on behalf of the United States Government’.<sup>9</sup>

The Divisional Court then ruled that the second, third and fourth elements were satisfied on the facts of the particular case. It held that the Security Service had interviewed Mr Mohamed and facilitated US interrogations despite knowing that he was detained incommunicado and that he had been mistreated. It was therefore ‘mixed up’ in the matter: ‘the relationship of the United Kingdom Government to the United States authorities in connection with [Mr Mohamed] was far beyond that of a bystander or witness to the alleged wrongdoing’.<sup>10</sup> The court held that the Foreign Secretary possessed 42 documents that constituted ‘information essential to a fair consideration of [the claimant’s] case and a fair trial’ in the Military Commission proceedings.<sup>11</sup> Furthermore, the Divisional Court held that the US authorities would be unlikely to make the documentation available to Mr Mohamed within ‘proper time’ to enable them to be used in his defence and that there was evidence to suggest that the US authorities would ‘seek to delay as long as possible the disclosure’. It was therefore necessary for the documents to be disclosed.<sup>12</sup>

Yet, despite these findings, the court did not rule that the documents should be disclosed at that stage. Rather, the court gave the Secretary of State the opportunity to consider whether he should make a public interest immunity (PII) certificate in respect of the documents.<sup>13</sup> He did so, relying on the ‘control principle’. A number of the documents sought by Mr Mohamed were of US origin: they had been passed by the US intelligence services to their counterparts in the United Kingdom. Intelligence-sharing, the Secretary of State explained in his PII certificate, is essential between allies such as the United States and the United Kingdom: it is ‘vital to the national security of the United Kingdom’ such that ‘it saves lives’. To this end, the Secretary of State certified that ‘it is essential that the ability of the United States to communicate in confidence with the United Kingdom is protected; without this confidence they simply will not share information in the open manner that is currently the case’. It followed, in the Secretary of State’s view, that

disclosure of [the] documents by order of our courts or otherwise by United Kingdom authorities would seriously harm the existing intelligence-sharing arrangements between the United Kingdom and the United States and cause considerable damage to the national security of the United Kingdom.<sup>14</sup>

<sup>9</sup> [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579, at [67]–[68] (United Kingdom).

<sup>10</sup> *ibid.*, [88].

<sup>11</sup> *ibid.*, [106].

<sup>12</sup> *ibid.*, [126].

<sup>13</sup> PII is a doctrine of the law of evidence which enables a Secretary of State to certify that it would be contrary to the public interest for material evidence in a trial to be disclosed. See further below.

<sup>14</sup> PII Certificate dated 26 August 2008. Ultimately there were five PII certificates made in the case: two by the Home Secretary and three by the Foreign Secretary.

It should be emphasised, however, that there was no question of disclosure of the 42 documents to the world at large, or even to Mr Mohamed's UK lawyers. What was sought was disclosure to the claimant's US lawyers who had been given security clearance in accordance with the regime established for providing legal representation to Guantanamo detainees.<sup>15</sup>

Following the Divisional Court's judgment the US authorities made a number of concessions, the most important of which was that the 42 documents would be disclosed if charges were referred for trial before a Military Commission. However the US Government still refused to disclose them before the Military Commission Convening Authority (who is responsible for deciding whether charges should be formally referred to the Military Commission) or for use in habeas corpus proceedings. What then occurred was a period of quite extraordinary inter-play between the UK proceedings and proceedings in the United States. The US Government abandoned an allegation that the claimant had been involved in a dirty bomb plot, and an order was made in habeas corpus proceedings that seven of the 42 documents should be disclosed to Mr Mohamed's security-cleared lawyers in redacted form. Then, in October 2008 the Military Commission Convening Authority dismissed the charges against Mr Mohamed (although new charges could still have been referred and there was an indication that they would be).

The matter came back before the Divisional Court that same month. The Court indicated that it was both shocked and mystified that the US Government had still not provided all of the documents to Binyam Mohamed's US defence team. In a strongly worded judgment it stated that it could 'see no rational basis for the refusal by the US Government to provide the documents';<sup>16</sup> and it warned that 'if disclosure was not given', it would rule on the disclosure application including the submission that 'the Government of the United States is deliberately seeking to avoid disclosure of the 42 documents'.<sup>17</sup> Just in case anyone was in doubt as to which way the wind was blowing, the court concluded by stating:

We must record that we have found the events set out in this judgment deeply disturbing. This matter must be brought to a just conclusion as soon as possible, given the delays and unexplained changes of course which have taken place on the part of the United States Government.<sup>18</sup>

Nonetheless the Court stayed the matter, giving the US authorities further time to make the disclosures.<sup>19</sup> At this point the 42 documents were disclosed in the habeas corpus proceedings before the US District Court, albeit in redacted format. They were also permitted to be used before the Military Commission Convening Authority.

Whilst we cannot determine the contribution that the UK proceedings made to the disclosure of the 42 documents, their identification in the UK proceedings as being highly relevant to Mr Mohamed's defence, the robust and strongly-worded judgments of the Divisional Court, as well as the ever-present risk of disclosure and further, possibly even stronger, criticism of the US Government by the UK court, seem to have played a part, either in terms of placing indirect pressure on the US authorities via the UK Government or, at least, as a form of inter-state judicial dialogue. The chronology of events and

<sup>15</sup> See the account of this regime given by Cole and Vladeck, [chapter eight](#) of this volume.

<sup>16</sup> [2008] EWHC 2519 (Admin) at [4] (United Kingdom).

<sup>17</sup> *ibid.*, [55].

<sup>18</sup> *ibid.*, [55].

<sup>19</sup> The order to stay was requested by the UK Government and, at the time, was resisted by Mr Mohamed's UK legal team.

reported circumstances suggest that it was the combined effect of pressure from proceedings on both sides of the Atlantic that resulted in the eventual disclosures to Mr Mohamed's US security-cleared legal team.<sup>20</sup>

The disclosure of the 42 documents meant that there was no further remedy sought in the UK claim but there was one *issue* remaining in the case and this turned out to be an intractable one. In a PII certificate issued in September 2008, the Foreign Secretary had objected not only to the disclosure of the 42 documents but also to the publication of seven paragraphs in the Divisional Court's first judgment. These paragraphs provided a summary of reports by the CIA on the circumstances of Mr Mohamed's detention in Pakistan and of the interrogation techniques employed here by US authorities. At the same time, the paragraphs were important to the court's reasoning, in particular to understanding the degree to which UK authorities had become mixed-up in the arguable wrongdoing of US authorities. The CIA reports had been received by the United Kingdom before Mr Mohamed was interviewed in Pakistan by a British intelligence officer and therefore demonstrated the degree of knowledge of the conditions of detention (in particular the use of sleep deprivation techniques foresworn by the United Kingdom in 1972) prior to the intelligence officer seeking to extract information from Mr Mohamed.

The question was whether or not these paragraphs should be restored to the judgment and made public. At first, the Divisional Court held that the paragraphs should remain redacted. The Court reasoned that it would not be in the public interest 'to expose the United Kingdom to what the Foreign Secretary still considers to be the real risk of the loss of intelligence so vital to the safety of our day to day life'.<sup>21</sup> However, it transpired that no inquiry had been made of the new Obama administration about its view of the disclosure of the seven paragraphs. There followed further hearings, and further evidence and further PII certificates, after which the Court held that its earlier judgment refusing to disclose the seven paragraphs had been based on a mistake and, amazingly, it reversed it. Although the Court went out of its way to acquit the UK Government of any bad faith,<sup>22</sup> it is easy to see why by this stage many on-lookers considered that the Court's trust and confidence in the Government and its evidence had been very badly shaken.<sup>23</sup>

<sup>20</sup> Two other things were going on in parallel to the legal proceedings which contributed to the high-octane nature of the litigation. First, the UK Government was making concerted efforts to obtain the release and repatriation of Mr Mohamed and other UK residents held in Guantanamo Bay. Secondly, there was a US Presidential election campaign in 2008. And on 4 November 2008 Barack Obama won the Presidency, promising the closure of Guantanamo Bay and a new approach to Government secrecy and international relations. On 22 January 2009, two days after taking office, President Obama issued an executive order prohibiting new charges being brought against Guantanamo detainees. Then, on 23 February 2009, the UK Government's efforts to release Mr Mohamed came to fruition and he was put on an airplane to the UK where he was released. The extent to which the legal proceedings might have played a part in Mr Mohamed's return is impossible to judge. But if the UK Government thought that the return of Mr Mohamed would bring the legal proceedings to end, events proved otherwise.

<sup>21</sup> [2009] EWHC 152 (Admin), [2009] 1 WLR 2653, at [107] (United Kingdom).

<sup>22</sup> [2009] EWHC 2549 (Admin), [2009] 1 WLR 2653, at [96]–[100] (United Kingdom).

<sup>23</sup> It is also an important part of the story, and relevant to the potential loss of confidence in the Government's evidence, that after the Court had initially upheld PII over the seven paragraphs and was considering whether to reverse this finding, further documents, described by the court as 'highly significant', were found and disclosed by the UK intelligence services which showed that they had more knowledge of the mistreatment and extraordinary rendition of Mr Mohamed than had been thought. At this very late stage, the Divisional Court felt the need to take the 'quite exceptional step' of correcting parts of its first judgment in which it had made findings of fact relating to the degree to which the UK had been mixed-up in the actions of the CIA; the Court also stated that it had made 'extensive revisions' to its closed judgment. The Court said that had these documents been available it would inevitably have made further open findings on that issue: [2009] EWHC 2549 (Admin) at [61]–[63] (United Kingdom). The published version of the Divisional Court's first judgment was subsequently revised.

The court also appears to have been simply unable to believe that the Obama administration would put up any serious objection to the reinstatement of the seven paragraphs, given the compelling case for openness as to the mistreatment of Mr Mohamed. Obama's Presidential election campaign had been very closely followed by the British media and like much of the rest of the world Britain had been swept up in the euphoric mood that followed his election. Indeed, it is worth recalling that on 9 October 2009, just a few days before the court's judgment, it was announced that President Obama had been awarded the Nobel Peace Prize.<sup>24</sup>

The court referred to President Obama's commitment to transparency when running for office and the fact that on 16 April 2009 he had approved the release of a number of US Government memoranda that detailed the treatment inflicted on detainees by the CIA.<sup>25</sup> The court held that the seven paragraphs contained information about interrogation techniques that was no different from that which President Obama had himself put in the public domain and which he had emphasised was information necessary to uphold the rule of law. More strikingly, it held that an objection to publication raised by US Secretary of State Hilary Clinton, after the Obama administration had been approached about the issue, must have been made 'without a proper analysis or understanding' of the limited nature of the disclosure proposed.<sup>26</sup> It concluded that although there was 'some small risk' that intelligence sharing would be reviewed or affected if the court were to disclose the redacted paragraphs, 'the evidence simply does not sustain the Foreign Secretary's opinion that there is a serious risk'.<sup>27</sup>

The Government appealed to the Court of Appeal, instructing Jonathan Sumption QC, whose eminence at the Bar at the time was afterwards reflected in his appointment directly to the UK Supreme Court: this was an appeal the UK Government appeared determined to win. For its part, the Court of Appeal convened the strongest appeal court possible: Lord Judge, the Lord Chief Justice, Lord Neuberger,<sup>28</sup> the Master of the Rolls and Sir Anthony May, President of the Queen's Bench Division.

The Court of Appeal dismissed the Government's appeal, albeit only by a whisker and only after changing its own collective judicial mind. Following the Court of Appeal hearing the Government discovered, and drew the court's attention to, a decision of the US District Court for the District of Columbia in habeas corpus proceedings brought by another Guantanamo detainee who was detained in part on the basis of evidence provided by Mr Mohamed. District Judge Kessler held that the evidence from Mr Mohamed could not be relied upon, finding his account of his treatment to be proven and that his mistreatment amounted to torture.<sup>29</sup> The mistreatment of Mr Mohamed had thus been judicially found to be a matter of fact by the courts of the United States. As such, on one view, there was no longer any confidentiality in the information contained in the

<sup>24</sup> Given the procedure for judgments in such a case to be sent first to the Government for security checking, the judgment had probably been written by 9 October 2009, but it is a reminder of the historical context and prevailing mood.

<sup>25</sup> [2009] EWHC 2549 (Admin), [2009] 1 WLR 2653, at [38]. For the memos see KJ Greenberg and JL Dratel (eds), *The Torture Papers: the Road to Abu Ghraib* (Cambridge, CUP, 2005).

<sup>26</sup> [2009] EWHC 2549 (Admin), [2009] 1 WLR 2653, at [93] (United Kingdom).

<sup>27</sup> *ibid.*, [95].

<sup>28</sup> In 2012 Lord Neuberger became the President of the UK Supreme Court.

<sup>29</sup> *Farhi Saeed Bin Mohammed v Obama*, 704 F Supp 2d 1 (2009) (United States). See n 10 above.



seven paragraphs as to the treatment of Mr Mohamed. For two members of the court – Sir Anthony May P and Lord Neuberger MR – this was decisive.<sup>30</sup>

Sir Anthony May P reasoned that the judgment of Judge Kessler tipped the balance of public interests in favour of disclosure. Not only had an arguable case of torture become a case in which torture had been found to have occurred, but disclosure of information established as a fact in other proceedings could not ‘in any real sense’ be regarded as a breach of the control principle.<sup>31</sup> Lord Neuberger MR reasoned, rather differently, that there was no longer any evidential basis for the contention that the control principle would be infringed by making the paragraphs public or that a constriction of intelligence-sharing would result, given that the paragraphs describe mistreatment that had been found as a fact by a US court.<sup>32</sup> Lord Judge CJ, who alone would have dismissed the appeal irrespective of Judge Kessler’s judgment, took a more robust view and thought as a matter of principle that the paragraphs should be restored:

[U]nless the control principle is to be treated as if it were absolute, it is hard to conceive of a clearer case for its disapplication than a judgment in which its application would partially conceal the full reasons why the court concluded that those for whom the executive in this country is ultimately responsible were involved in or facilitated wrongdoing in the context of the abhorrent practice of torture. Such a case engages concepts of democratic accountability and, ultimately, the rule of law itself.<sup>33</sup>

In understanding the Court of Appeal’s judgment it is important to be clear about the nature of the material contained in the seven paragraphs. There is nothing in them that could identify any agent or any facility or any secret means of intelligence gathering. They do not themselves contain secret intelligence, or provide any information that could put anyone in harm’s way. Lord Judge CJ repeatedly stressed this point in his judgment: he stated, for example, that the redacted paragraphs do not identify methods of surveillance or reveal the methods employed by the security and intelligence service to penetrate terrorist groups. Indeed, he said, ‘it seems right to emphasise that the publication of the redacted paragraphs would not and could not of itself do the slightest damage to the public interest’.<sup>34</sup> The paragraphs do give limited information, on all fours with that made public by the Obama administration, about certain US interrogation techniques. The redacted paragraphs state that Mr Mohamed was subject to ‘sleep deprivation, threats and inducements’; that his fears of ‘disappearing’ were played upon; that he was shackled; that he was under ‘significant mental stress’; that this treatment, if it had been administered on behalf of the United Kingdom, would have been unlawful; and that it could ‘easily be contended to be at the very least cruel, inhuman and degrading treatment’.<sup>35</sup>

<sup>30</sup> It is one of the many extraordinary parts of the transatlantic tale that had Judge Kessler’s judgment not been drawn to the Court’s attention by the Government, as it quite properly was, the Government’s appeal would have been allowed and the law in the UK may now have had a very different shape.

<sup>31</sup> [2010] EWCA Civ 65, [2011] QB 218, at [295] (United Kingdom). Angels, he said, ‘are now dancing on a pinhead’.

<sup>32</sup> *ibid.*, [203].

<sup>33</sup> *ibid.*, [57].

<sup>34</sup> *ibid.*, [52]. See, to like effect, Lord Judge CJ, at [13] (and see further below).

<sup>35</sup> The full text of the paragraphs is printed in the official law report of the Court of Appeal’s judgment: see [2011] QB 218, 314.

## IV. REACTIONS TO BINYAM MOHAMED

Despite its efforts to reverse the Divisional Court judgment, the Government was swift to portray the decision of the Court of Appeal as a victory. It did not seek to appeal to the Supreme Court and the seven paragraphs were therefore disclosed.<sup>36</sup> On the day the judgment was handed down, the then Foreign Secretary (David Miliband MP) made a statement to the House of Commons in which he welcomed the fact that ‘crucially, the court has today upheld the control principle’. The Secretary of State described the judgment as having ‘specifically vindicate[d] the careful assessment that releasing the seven paragraphs without the consent of the United States would have damaged the public interest’.<sup>37</sup> The basis for these comments is the fact that the court acknowledged the ‘centrality of the control principle or confidentiality to intelligence-sharing arrangements’, and the need in general terms to respect the same (albeit that the principle is not a rule of law and is not absolute).<sup>38</sup>

The then Shadow Foreign Secretary (William Hague MP<sup>39</sup>) agreed with the Government, welcoming the judgment of the Court of Appeal, ‘which upholds the principle of control’, as he put it.<sup>40</sup> Their shared view was subsequently endorsed by the Intelligence and Security Committee (ISC), which stated as follows in its *Annual Report* for 2009–10:<sup>41</sup>

The Committee is concerned that the publication of other countries’ intelligence material, whether sensitive or otherwise, threatens to undermine the key ‘control principle’ of confidentiality which underpins relations with foreign intelligence services, and that this may seriously damage future intelligence co-operation. We therefore welcome the Court of Appeal’s recognition of the importance of the ‘control principle’.

This positive view of the Court of Appeal’s judgment was given despite the fact that, as the Committee noted, the US Office of the Director of National Intelligence had released a statement following the Court of Appeal’s judgment stating that: ‘The decision by a United Kingdom court to release classified information provided by the United States is not helpful, and we deeply regret it’.<sup>42</sup>

However, the views of both the Government and the ISC subsequently changed, as a direct result of representations made by US intelligence agencies. On 6 July 2010, the Prime Minister stated that the judgment had ‘strained’ its intelligence partnership with the United States because it had created ‘doubts about our ability to protect the secrets

<sup>36</sup> Even so, the proceedings were not yet quite over. Prior to handing down his judgment Lord Neuberger MR had, at the request of the Government in a letter from Jonathan Sumption QC, removed some pointed criticisms of the UK security service. Following objections from the claimant and intervening parties, as well as the dissemination of Jonathan Sumption’s letter, the Court of Appeal handed down a second judgment restoring, with further clarification, the criticisms to Lord Neuberger’s judgment and criticising the dissemination of the letter: [2010] EWCA Civ 158.

<sup>37</sup> HC Deb, 10 February 2010, cols 913–14.

<sup>38</sup> [2010] EWCA Civ 65, [2011] QB 218, at [49] (Lord Judge CJ); cf at [287] (May P).

<sup>39</sup> Following the general election of May 2010 Mr Hague replaced Mr Miliband as Foreign Secretary.

<sup>40</sup> Mr Hague said the following: ‘We . . . welcome today’s judgment, which upholds the principle of control and the need for openness in this particular case’ and added that ‘We have always believed that the principle of control could be upheld while seeking an exception in this case from the United States’ (HC Deb, 10 February 2010, col 916).

<sup>41</sup> ISC, *Annual Report* 2009–10 (Cm 7844, 2010) para 57.

<sup>42</sup> *Statement by the Office of the Director of National Intelligence*, 10 February 2010.



of our allies'.<sup>43</sup> He indicated that a proposal for legislative reform would be brought forward in a Green Paper.

In its *Annual Report* for 2010–11 the ISC also returned to the subject and reported that on a visit to the United States they had been 'struck by the force with which certain interlocutors within the US intelligence community voiced their worries'.<sup>44</sup> The reason appears to have been that the US intelligence community view all material or information generated by their intelligence agencies as their property.<sup>45</sup> In contradiction to its previous view that the Court of Appeal had upheld the control principle, the ISC went on to state its concern that 'the inability of the Government to prevent disclosure represented a breach of the "control principle"'.<sup>46</sup> It also stated that the decision in the *Binyam Mohamed* case 'resulted in the release of US intelligence material'.<sup>47</sup> Since the material was not, as we have seen, intelligence as such, we must take the Committee to mean information supplied by a foreign intelligence agency. The ISC concluded with a recommendation that the law be urgently changed.<sup>48</sup>

What is particularly unsatisfactory about all of this is not that the Government and the ISC changed their opinion (*sub silentio*!) of the Court of Appeal's judgment – even law professors must be allowed to change their view of a case from time to time – but that their views of the merits of the Court of Appeal's judgment, and of the approach of the UK courts more generally, were determined entirely by a one-sided concern driven by the US intelligence community. It was not offset by any consideration or concern for the fact that the information disclosed serious mistreatment of a British resident, the fact that this information was central to understanding the degree of complicity of British officials in conduct which is outlawed by the laws of this country, or that the disclosure of the information sought in the proceedings to security-cleared counsel was necessary to provide Mr Mohamed with a fair trial on a capital charge based on evidence obtained through torture. Nor, for that matter, was there any express consideration given to the fact that the material was not operationally sensitive and did not endanger anyone or anything. Insofar as we can tell from the public record, the preferences of the US foreign intelligence services were regarded as effectively decisive and dictated a change in the law in the United Kingdom.

The Green Paper on *Justice and Security* published in October 2011, which proposed curtailing the *Norwich Pharmacal* jurisdiction along with the introduction of closed material procedure in ordinary civil claims, was explicit as to the reasons for the proposal:

[T]he UK Government has received clear signals that if we are unable to safeguard material shared by foreign partners, then we can expect the depth and breadth of sensitive material shared with us to reduce significantly. There is no suggestion that key 'threat to life' information would not be shared, but there is already evidence that the flow of sensitive material has been affected. The risk is that such material withheld by a foreign partner might, when pieced together with other intelligence material in the possession of the Government, provide the critical 'piece of the jigsaw' that would allow a threat to be contained, or a terrorist to be brought

<sup>43</sup> HC Deb, 6 July 2010, col 175.

<sup>44</sup> ISC, *Annual Report* 2010–11 (Cm 8114, 2011) para 230.

<sup>45</sup> The relevant sentence in the report is redacted, and reads: 'we heard from a number of US agencies and departments that they viewed their material as \*\*\*'. If not US property, then presumably inviolable or secret or some other adjective with a similar meaning.

<sup>46</sup> *ibid*, para 226.

<sup>47</sup> *ibid*, para 16.

<sup>48</sup> Recommendation AA on p 66 of the ISC's *Annual Report* for 2010–11.

to justice. The fullest possible exchange of sensitive intelligence material between the UK and its foreign partners is critical to the UK's national security.<sup>49</sup>

One important piece of information disclosed in this passage relates to the limited nature of the contraction that was said to be a risk. Whilst no doubt the Government is entirely right to lament any contraction of intelligence flow, the recognition of the limited nature of the contraction calls for consideration of whether such contraction is tolerable if it means that courts in this country can, in an exceptional case, disclose wrongdoing of others in which British officials are mixed up. Moreover, we know that the exchange of information between intelligence agencies has never been entirely open, even between the United Kingdom and the United States. This is well illustrated by *Binyam Mohamed* itself. As the Divisional Court recorded, the Security Service was denied information from the United States as to Mr Mohamed's whereabouts after he was rendered from Pakistan: the United Kingdom could infer he was at a black site, but the United States would not confirm his location.<sup>50</sup> The true question therefore was whether a further limited contraction in openness justified a change in the law. At the least, the question clearly arises of what would be lost if the law were changed. Unfortunately, however, the debate was never conducted in this way.

The proposals to abolish *Norwich Pharmacal* jurisdiction provoked much controversy – given its effective use in the *Binyam Mohamed* case – from NGOs and others.<sup>51</sup> But they were none the less brought forward in the Justice and Security Bill, introduced into Parliament in May 2012. The views of the US authorities were emphasised to Parliament both by the Government and by members of the ISC in support of the provisions.<sup>52</sup> Kenneth Clarke MP, the minister responsible for the Bill in the House of Commons, informed Parliament that the American authorities were 'extremely alarmed' that a UK court should have disclosed information contained in a CIA document and they 'wish to be reassured'.<sup>53</sup> It was of course impossible for Parliament to go behind the statements as to the degree of US disquiet and no further information about the precise implications for national security was made public. All that skeptical Parliamentarians could do was to point to the absence of merit in the US position.<sup>54</sup> They suggested that American fears were based on a 'misapprehension'<sup>55</sup> or on a 'false perception'<sup>56</sup> of the law as articulated in the *Binyam Mohamed* case, or were 'simply unfounded'.<sup>57</sup> After all, a UK court had never disclosed intelligence or source material against the objections of the Government and had only disclosed the seven paragraphs because their content was no longer secret.

<sup>49</sup> HM Govt, *Green Paper, Justice and Security* (Cm 8194, 2011) para 1.22.

<sup>50</sup> [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579, at [29]–[32] (United Kingdom).

<sup>51</sup> The Cabinet Office has a valuable website which contains extensive materials on the Justice and Security reforms and includes responses to the Green Paper: [consultation.cabinetoffice.gov.uk/justiceandsecurity/the-justice-and-security-bill](http://consultation.cabinetoffice.gov.uk/justiceandsecurity/the-justice-and-security-bill). Among numerous examples, Amnesty International described the proposed reforms to *Norwich Pharmacal* as 'deeply problematic'; Justice described them as 'unacceptable and unnecessary'; and the Bingham Centre for the Rule of Law described them as 'based on several misconceptions and . . . unjustified'.

<sup>52</sup> HC Deb, 18 December 2012, cols 726–27 and 4 March 2013, col 748 (Kenneth Clarke MP); HC Deb, 18 December 2012, col 727 (Sir Malcolm Rifkind MP) and col 752 (Hazel Blears MP); HL Deb, 19 June 2012, col 1681 (Lord Butler) and col 1686 (Marquess of Lothian).

<sup>53</sup> HC Deb, 4 March 2013, col 748.

<sup>54</sup> HL Deb, 19 June 2012, col 1692 (Lord Lester of Herne Hill).

<sup>55</sup> *ibid*, col 1725 (Lord Macdonald of River Glaven).

<sup>56</sup> *ibid*, col 1748 (Baroness Manningham-Buller).

<sup>57</sup> HL Deb, 23 July 2012, col 543 (Lord Pannick).

But such objections could not prevail. Lord Butler, for example, explained frankly that: ‘the trust of the US has been weakened and we need to restore that trust. *It matters not that the grounds for the breaking of that trust may not be justified*’ (emphasis added). In somewhat different terms the minister responsible for the Bill in the House of Lords, Lord Wallace of Tankerness, explained that ‘the very existence’ of the courts’ *Norwich Pharmacal* jurisdiction in the national security field ‘can erode the confidence of our agents and our intelligence-sharing partners that we can protect the secrets they share with us’.<sup>58</sup>

As the Bill progressed through its various parliamentary stages, opposition to the *Norwich Pharmacal* provisions withered. This was partly because the focus of the Bill’s many critics was elsewhere – namely, on its provisions concerned with closed material procedure and special advocates – and it was partly also because the Labour party were never entirely sure whether they should support or oppose the Government’s plans on *Norwich Pharmacal*: it had, after all, been a Labour Foreign Secretary (David Miliband) who had signed the critical PII certificates in *Binyam Mohamed*. But it was also because Parliament could not question the degree or precise nature of US concerns and was in no real position to challenge the alleged need to provide legislative reassurance. Parliament’s Joint Committee on Human Rights, for instance, recognised that it had to accept that in the light of the American view as expressed by the Government and the ISC, it was legitimate to seek to reassure intelligence partners by providing greater legal certainty. The Committee was able to question only whether the reforms were proportionate. It pointed out, for instance, that the legislation would go well beyond meeting the concerns of the American authorities. Not only would it render all information received from intelligence partners absolutely immune from disclosure in *Norwich Pharmacal* proceedings, even if no objection or breach of the control principle would result, it would also extend to all information held by the intelligence services, whether received from a foreign partner or not.<sup>59</sup> In other words, pressure from the United States was being used as an opportunity by the Government to shore-up and widen the secrecy of the United Kingdom’s intelligence services.

## V. NATIONAL SECURITY LITIGATION IN THE US: THE BREADTH OF SECRECY

Let us now turn to consider the US perspective and the basis for the pressure for the reform of UK law. The United States takes a quite different approach to secrecy and judicially-developed doctrines have gone to considerable lengths to keep national security issues out of the courts. Various doctrines operate to this effect, in particular, the state secrets doctrine, the law of standing, the political question doctrine and the law of sovereign immunity. In this paper, it is sufficient for us to examine the first of these.

The state secrets doctrine in US law formally comprises two elements: a rule of evidence known as the state secrets privilege, and a jurisdictional bar named after the nineteenth-century US Supreme Court case of *Totten*.<sup>60</sup> On the state secrets privilege the seminal judgment is that of the US Supreme Court in *Reynolds v United States*. This established the

<sup>58</sup> HL Deb, 21 November 2013, col 1922.

<sup>59</sup> Joint Committee on Human Rights, *Fourth Report of 2012–13* (HL 59, HC 370, 6 November 2012) 24–29.

<sup>60</sup> *Totten v United States*, 92 US 105 (1875) (United States).

privilege 'in its modern form'<sup>61</sup> as a rule of evidence which precludes courts from requiring the disclosure of evidence that would reveal military or state secrets.<sup>62</sup> It is a common law rule, although it 'performs a function of constitutional significance'.<sup>63</sup> As a rule of evidence it does not necessarily bar civil claims, although a party deprived of evidence could thereby be so prejudiced in their case that it might prove determinative. Thus, in *Reynolds* itself, the wives of three men killed when a B-29 Superfortress crashed in 1948 whilst testing secret equipment, sought disclosure of an accident report into the crash in support of their tort claim. The Supreme Court held that the report was privileged but that the plaintiffs could and should seek to make out their case on the available evidence.

*Reynolds* also made clear that US courts are required to be satisfied that a claim of state secrets privilege is well-founded: there should be no unquestioning acceptance of official assertions of privilege: 'judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers'.<sup>64</sup> The court must be satisfied that 'there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interests of national security, should not be divulged'.<sup>65</sup> There is formally a burden on the Government to make out the claim, but the court will show 'utmost deference' to the executive branch.<sup>66</sup> In practice, 'few courts order inspection of the documents in question', resulting in the *Reynolds* approach to state secrets privilege requiring 'little scrutiny of the Government claim'.<sup>67</sup> This is exacerbated in the context of national security, in which documents seem rarely if ever to be examined: 'even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake'.<sup>68</sup> Furthermore, in the US courts 'no attempt is made to balance the need for secrecy of the privileged information against a party's need for the information's disclosure'.<sup>69</sup> The effect of a determination that a piece of evidence is a privileged state secret is its removal from the proceedings entirely.<sup>70</sup>

The so-called *Totten* bar also operates in the context of cases that are pervaded by secrecy. In *Totten* the Supreme Court held unenforceable a claim brought by the estate of a Civil War spy on a contract allegedly made with President Lincoln himself for covert action behind enemy lines.<sup>71</sup> The court held that the claim could not be litigated at all, as it centrally concerned a secret arrangement. This rule was recently revisited by the Supreme Court in *General Dynamics v United States*,<sup>72</sup> which concerned a claim by the

<sup>61</sup> *El-Masri v Tenet*, 479 F 3d 296, 302 (4th Cir 2007) (United States) (we consider this case in detail below). The Supreme Court did not create the state secrets privilege anew in *Reynolds*. It had earlier antecedents, but *Reynolds* established the modern law.

<sup>62</sup> *United States v Reynolds*, 345 US 1, 6–7 (1953) (United States). In *General Dynamics Corp v United States*, 563 US (2011) (United States), Scalia J, delivering the Opinion of the Court, stated that '*Reynolds* was about the admission of evidence. It decided a purely evidentiary dispute by applying evidentiary rules: The privileged information is excluded and the trial goes on without it' (at 6) [slip opinion].

<sup>63</sup> *El-Masri*, 479 F 3d 296, 303; *United States v Nixon*, 418 US 683, 710 (1974) (United States).

<sup>64</sup> *Reynolds*, 345 US 1, 9–10.

<sup>65</sup> *ibid*, 10.

<sup>66</sup> *United States v Nixon*, 418 US 683, 710 (1974) (United States).

<sup>67</sup> J Kalajdzic, 'Litigating State Secrets: A Comparative Study' (2009–10) 41 *Ottawa Law Review* 289, 295.

<sup>68</sup> *ibid*.

<sup>69</sup> *El-Masri*, 479 F 3d 296, 306. See, to the same effect, *Mohamed v Jeppesen Dataplan Inc*, 614 F 3d 1070, 1081 (9th Cir 2010) (United States): 'If [the *Reynolds*] standard is met, the evidence is absolutely privileged, irrespective of the plaintiff's countervailing need for it'.

<sup>70</sup> *Reynolds*, 345 US 1, 11.

<sup>71</sup> *Totten v United States*, 92 US 105, 106 (1875) (United States).

<sup>72</sup> *General Dynamics Corp v United States* 563 US (2011) (United States).

Government for repayment of money advanced under a contract for development of stealth aircraft. In its defence General Dynamics argued that the Government was withholding crucial know-how, a recognised contractual defence in US law. The Supreme Court held that establishing the know-how defence would risk inadvertent disclosure of national security material and it therefore could not be litigated.

Two recent cases arising out of the US practice of extraordinary rendition<sup>73</sup> demonstrate the contemporary application of the state secrets privilege and the *Totten* bar in tort claims. The first case, *El-Masri v Tenet and Others*,<sup>74</sup> was a claim brought by Khaled El-Masri against the Director of the CIA, 10 unnamed (and presumably unknown) employees of the CIA and three corporate defendants. El-Masri, a German citizen, claimed that in December 2003 he had been detained in Macedonia and handed over to the CIA who flew him to a detention facility near Kabul, where he was held until May 2004. He was then flown to Albania and released in a remote area. He claimed that he had been drugged, beaten, detained in a tiny and unsanitary cell, subjected to torture and inhuman and degrading treatment, prevented from communicating with the outside world, including his family or the German Government (let alone a lawyer or the Red Cross). The second case was brought by Binyam Mohamed, Bisher Al-Rawi and three other victims of extraordinary rendition.<sup>75</sup> They sued Jeppesen Dataplan Inc, a US corporation that, in the words of the court, was alleged to have 'provided flight planning and logistical support services to the aircraft and crew on all of the flights transporting each of the five plaintiffs among various locations where they were detained and allegedly subjected to torture'.<sup>76</sup>

El-Masri's claim was brought as a claim alleging violation by the specified CIA employees of the Fifth Amendment right to due process (a *Bivens* claim for unconstitutional conduct<sup>77</sup>) and, secondly, as a claim under the Alien Tort Statute for breaching *ius cogens* norms of international law.<sup>78</sup> In *Mohamed and Others v Jeppesen Dataplan Inc*, the claim was brought against the aircraft company, which a painstaking analysis of flight records showed had been used by the CIA in transporting the plaintiffs between various countries. The circuitous ways that the claims were framed is a reflection of the various substantive immunities and other bars to direct claims against the US

<sup>73</sup> In *Arar v Ashcroft*, 585 F 3d 559, 564 (2nd Cir 2009), the US Court of Appeals for the Second Circuit, sitting *en banc*, explained as follows: *rendition* refers to 'the transfer of a fugitive from one state to another'; *extradition* is a 'distinct form of rendition'; and *extraordinary rendition* refers to 'the extra-judicial transfer of a person from one country to another', or, more particularly, to 'the transfer, without formal charges, trial or court approval, of a person suspected of being a terrorist or supporter of a terrorist group to a foreign nation for imprisonment and interrogation on behalf of the transferring nation'. On 6 September 2006, President Bush publicly admitted that which had been widely known for some time (not least through the testimonies of those subject to it), namely, that the US Government had been holding unnamed alleged terrorist 'enemy combatants' in secret detention centres around the world: see L Sadat, 'Extraordinary Rendition, Torture, and other Nightmares from the War on Terror' (2007) 75 *George Washington Law Review* 1200.

<sup>74</sup> *El-Masri v Tenet and Others*, 479 F 3d 296 (4th Cir 2007) (United States).

<sup>75</sup> *Mohamed and Others v Jeppesen Dataplan Inc*, 614 F 3d 1070 (9th Cir 2010) (United States).

<sup>76</sup> *ibid*, 1075.

<sup>77</sup> *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 388 (1971) (United States). A *Bivens* claim is an implied private action for damages against federal officers alleged to have violated constitutional rights. A *Bivens* claim is brought against individuals, and any damages are payable by the offending officers.

<sup>78</sup> The Alien Tort Statute is best known for conferring on US courts jurisdiction to hear extra-territorial civil claims against foreign corporations for violations of fundamental principles of international law: see 28 USC § 1350.

Government and, had the cases been permitted to proceed further, there was no guarantee that these claims could have been sustained as a matter of law.<sup>79</sup>

In both *El-Masri* and *Mohamed and Others v Jeppesen Dataplan Inc*, the United States intervened and submitted both open and classified declarations from the then Directors of the CIA<sup>80</sup> stating that the cases could not proceed without disclosing state secrets.

In *El-Masri*, the District Court granted the motion to dismiss before the defendants had even submitted pleadings in defence of the claim. The Court of Appeals for the Fourth Circuit upheld the dismissal and the Supreme Court declined to hear an appeal.<sup>81</sup> There were two strands to the reasoning of the Court of Appeals in *El-Masri*. The first was that *El-Masri* could not make out even a prima facie case. This may seem somewhat surprising, given his ability to rely on his own testimony of his treatment, given his undoubted disappearance, given the US Government's public acknowledgement that it operated a rendition programme at the time, and given the powerful corroborative testimony of a strikingly similar modus operandi from other individuals who had been subject to extraordinary rendition, many of whom came to be openly held in US custody at Guantanamo Bay. The court reasoned that these public facts formed only the general background to the case and that to litigate it would require access to more particular facts, which were neither in the public domain nor accessible to El-Masri. As the court put it, 'advancing a case in the court of public opinion, against the United States at large, is an undertaking quite different from prevailing against specific defendants in a court of law'.<sup>82</sup> This was because, in order to establish a prima facie case, El-Masri would be 'obliged to produce admissible evidence not only that he was detained and interrogated, but that the defendants were involved in his detention and interrogation in a manner that renders them personally liable to him'.<sup>83</sup>

The court's reasoning on this point is comprehensible only in the context of the absence of direct or even vicarious liability of the US Government for conduct of individuals within its employ. If there were such liability, establishing the precise nature of the knowledge and involvement of particular individual officers could potentially be avoided, if the apprehension, detention and mistreatment could be shown to be illegal and attributable to US officials acting within the scope of their employment. However, the need in a *Bivens* claim to establish liability on the part of particular individuals meant that the facts central to making out El-Masri's legal case were not his forced disappearance and mistreatment but the roles, if any, that the defendants played in the events he alleged. The court considered that proving this would require evidence of how the CIA is organised and operates.<sup>84</sup>

Such a showing could be made only with evidence that exposes how the CIA organises, staffs, and supervises its most sensitive intelligence operations. With regard to Director Tenet, for example, El-Masri would be obliged to show in detail how the head of the CIA participates in such operations, and how information concerning their progress is relayed to him.

<sup>79</sup> For example, the ability of non-US citizens to rely on constitutional arguments is a moot point: see Kalajdzic, 'Litigating State Secrets: A Comparative Study'.

<sup>80</sup> Porter Goss in *El-Masri*, Michael Tenet in *Binyam Mohamed and Others*.

<sup>81</sup> 552 US 947 (2007) (cert den).

<sup>82</sup> *El-Masri*, 479 F 3d 296, 308–9.

<sup>83</sup> *ibid*, 309.

<sup>84</sup> *ibid*.



The second basis for the decision in *El-Masri* was that even if the plaintiff could establish a *prima facie* case, ‘the defendants could not properly defend themselves without using privileged evidence’.<sup>85</sup> Again, a prominent aspect of this reasoning was based on the need to establish individual liability of particular officers, who would not be able to show, if such was their defence, that their involvement in the particular operation involving El-Masri was limited. Furthermore, the court was concerned not only about the need to prove matters relating to the organisation and operation of the CIA, but that even showing that the mistreatment of El-Masri did *not* occur ‘would require testimony by the personnel involved’ in his detention and interrogation.<sup>86</sup> Thus, ‘virtually any conceivable response to El-Masri’s allegations would disclose privileged information’.<sup>87</sup> Neither strand of reasoning in *El-Masri* distinguished cleanly between the *Reynolds* privilege and the *Totten* bar.

*Mohamed and Others v Jeppesen Dataplan Inc* was ultimately resolved in the same way, although the Court of Appeals for the Ninth Circuit decided it with notably more reluctance than was exhibited by the Fourth Circuit in *El-Masri*. The plaintiffs’ claims were structured quite differently from those in *El-Masri*. Whereas El-Masri sued the Director and other members of the CIA, in *Mohamed and Others v Jeppesen Dataplan Inc* the plaintiffs sued a private corporation.<sup>88</sup> The claim was based on the Alien Tort Statute and focused on two alleged harms: forced disappearance, and torture and other cruel, inhuman or degrading treatment.<sup>89</sup> In *Mohamed and Others v Jeppesen Dataplan Inc* the plaintiffs alleged that the defendants were liable directly (for active participation), through their ‘conspiracy with agents of the United States’, and through aiding and abetting US agents.<sup>90</sup> The plaintiffs’ argument was that the defendants ‘knew or reasonably should have known that the flights involved the transportation of terror suspects pursuant to the extraordinary rendition program’ and that this knowledge could be inferred from the fact that they had allegedly ‘falsified flight plans submitted to European air traffic control authorities to avoid public scrutiny of CIA flights’.<sup>91</sup>

The United States intervened in the proceedings and, as in *El-Masri*, two declarations (one classified and one open) were filed by the then Director of the CIA seeking the dismissal of the claim. The District Court granted the motion to dismiss and entered judgment for the defendants. In a judgment filed on 28 April 2009, a three-judge panel of the Court of Appeals reversed and remanded, holding that the Government had failed to establish a basis for dismissal under the state secrets doctrine but permitting the Government to reassert the doctrine at subsequent stages of the litigation.<sup>92</sup> The Court of Appeals then decided to take the case *en banc* in order to resolve the ‘questions of exceptional importance regarding the scope of the state secrets doctrine’ which the case raised.<sup>93</sup> By the time the case was re-argued before the *en banc* Ninth Circuit, President Obama had been elected to the White House. In September 2009 the Obama administration announced

<sup>85</sup> *ibid.*

<sup>86</sup> *ibid.*

<sup>87</sup> *ibid.*, 310.

<sup>88</sup> Jeppesen Dataplan Inc was said to have provided flight planning and logistical support services in respect of the aircraft and crew employed in task of extraordinary rendition.

<sup>89</sup> *Mohamed and Others v Jeppesen Dataplan Inc*, 614 F 3d 1070, 1075 (9th Cir 2010) (United States).

<sup>90</sup> *ibid.*, 1075–76.

<sup>91</sup> *ibid.*, 1076.

<sup>92</sup> *Mohamed and Others v Jeppesen Dataplan Inc*, 579 F 3d 943 (9th Cir 2009) (United States).

<sup>93</sup> *Mohamed and Others v Jeppesen Dataplan Inc*, 614 F 3d 1070, 1077 (9th Cir 2010) (United States).



new policies for invoking the state secrets privilege and it was speculated that reliance on the state secrets doctrine would be withdrawn in *Mohamed's* case. But it was not to be: the new administration, after having reviewed the case, determined that it was appropriate to continue to assert the state secrets privilege in the proceedings.<sup>94</sup>

The *en banc* Ninth Circuit was split six-to-five. In a judgment filed on 8 September 2010 the majority held that the District Court had been correct to dismiss the case by reason of state secrets. Unlike the Fourth Circuit in *El-Masri*, the majority in *Mohamed* was clear that this ruling was based on the *Reynolds* evidentiary privilege and not on the *Totten* bar.<sup>95</sup> The majority in *Mohamed* stated that *Totten might* bar some of the plaintiffs' claims (in particular, their allegations that Jeppesen had conspired with agents of the United States in the plaintiffs' forced disappearance and torture) but held that it did not need to rule on the matter, given its finding that the *Reynolds* privilege in any event meant that the case could not proceed.<sup>96</sup> Thus, the majority accepted (as had the Fourth Circuit in *El-Masri*) that the *Totten* bar applies to every case in which 'the very subject-matter of the action is a matter of state secret'.<sup>97</sup>

Again like the Fourth Circuit in *El-Masri*, the majority in *Mohamed* accepted that the *Reynolds* evidentiary privilege may be asserted 'prospectively, even at the pleading stage, rather than waiting for an evidentiary dispute to arise during discovery or trial'.<sup>98</sup> The majority in *Mohamed and Others v Jeppesen Dataplan Inc* accepted that the showing that the Government must make to prevail prospectively may be 'especially difficult', but 'foreclosing the Government from even trying to make that showing would be inconsistent with the need to protect state secrets'.<sup>99</sup> The majority accepted that, ordinarily, a successful invocation of the *Reynolds* privilege means that the particular evidence in respect of which it is invoked is excluded, and the litigation continues without that piece of evidence. But the majority ruled that, in some instances, the application of the privilege may require the dismissal of the action altogether: 'when this point is reached, the *Reynolds* privilege converges with the *Totten* bar'.<sup>100</sup> The majority was prepared to assume (without deciding) that the plaintiffs' prima facie case and Jeppesen's defence would not inevitably depend on privileged evidence, but held that dismissal was nonetheless 'required under *Reynolds* because there is no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets'.<sup>101</sup>

Judge Hawkins filed a powerfully written dissenting opinion, which was joined by four others. The dissent's starting point was starkly expressed:

[T]he state secrets doctrine . . . is so dangerous as a means of hiding governmental misbehavior under the guise of national security, and so violative of common rights to due process, that courts should confine its application to the narrowest circumstances that still protect the government's essential secrets.<sup>102</sup>

<sup>94</sup> *ibid.*

<sup>95</sup> *ibid.*, 1085.

<sup>96</sup> *ibid.*

<sup>97</sup> *ibid.*, 1078 (citing *Reynolds*, 345 US 1, at 11). The majority was nonetheless anxious to underscore that the 'categorical', 'absolute' protection of the *Totten* bar 'is appropriate only in narrow circumstances' (*ibid.*, 1084).

<sup>98</sup> *ibid.*, 1081.

<sup>99</sup> *ibid.*

<sup>100</sup> *ibid.*, 1083.

<sup>101</sup> *ibid.*, 1087 emphasis added.

<sup>102</sup> *ibid.*, 1094.

In their contribution to this volume at [chapter eight](#), ‘Navigating the Shoals of Secrecy’, David Cole and Stephen Vladeck provide an account of a second system that has been developed in the US in habeas petitions from Guantanamo Bay. According to procedures that have been fashioned in that context, intelligence material can be given to security-cleared lawyers acting for individuals who are detained. It was precisely such security-cleared lawyers that Binyam Mohamed claimed should be provided with the 42 documents and who, ultimately, were provided with them. However such individuals are prohibited from disclosing such information, even to their own clients, and secrecy prevails even if the individual needs to be told the information against him in order to meet minimum conditions of fairness. Furthermore, as Cole and Vladeck point out, under this system, in common with claims to state secrecy in civil damages claims, judges are not prepared to second-guess executive determinations, which are regarded as effectively determinative.<sup>103</sup>

## VI. A CLASH OF LEGAL CULTURES

For cases involving claims of gross human rights violations to be struck out at a preliminary stage based on general assertions of secrecy, as occurred in *El-Masri* and *Mohamed and Others v Jeppesen Dataplan Inc*, and for judges to provide no meaningful scrutiny of secrecy claims, is quite alien to lawyers schooled in Dicey’s principle of equality before the law and the correlative absence of any special immunities for state officials.<sup>104</sup>

Traditionally, such issues in the United Kingdom would be addressed through the PII process. If a minister considers that relevant evidence cannot be disclosed for reasons of national security, he signs a PII certificate to that effect. The Government will not claim PII based on a ‘class’ of documents, but only where the disclosure of the content of particular documents, or parts thereof, would cause identified harm to the public interest. The PII certificate is subject to review by a court and an assessment must be made by the court as to whether disclosure would cause ‘substantial harm’ or ‘real damage’ to the public interest. If so, this harm or risk of harm must be weighed against the interests in the administration of justice in having the documents disclosed to the other party – this is now referred to as the ‘Wiley balance’.<sup>105</sup> Thus, a court in the United Kingdom may uphold a PII certificate only if it is satisfied that the public interest in maintaining confidentiality outweighs the public interest in disclosure. This was the process that was gone through in the *Binyam Mohamed* case.

The idea of ‘balance’ is central to the way in which the common law has fashioned the tools with which judges are to weigh the imperatives of security in any particular litigation in the United Kingdom.<sup>106</sup> It is a constitutional fundamental in our legal system that the view of the Government of the day does not exhaust the public interest: and national

<sup>103</sup> Cole and Vladeck [chapter eight](#) of this volume.

<sup>104</sup> AV Dicey, *Introduction to the Law of the Constitution* (London, MacMillan & Co, 1885), eg as he famously described the principle of legal equality in England, p 193: ‘With us every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen’.

<sup>105</sup> See *R v Chief Constable of West Midlands Police, ex parte Wiley* [1995] 1 AC 274 (United Kingdom). In fact, the Wiley balance dates back to *Conway v Rimmer* [1968] AC 910 (United Kingdom).

<sup>106</sup> For an overview of the authorities, see P Craig, *Administrative Law*, 7th edn (London, Sweet & Maxwell, 2012) para 13-009.

security is designed to safeguard the public interest, not merely the Government of the day. This was authoritatively recognised by the House of Lords as long ago as 1956<sup>107</sup> and since then has been many times repeated and emphasised.<sup>108</sup> The contrary position had been taken by the House of Lords in the famous Second World War case of *Duncan v Cammell Laird*,<sup>109</sup> but this was overruled by the law lords first (for Scots law) in 1956<sup>110</sup> and then (for English law) in the celebrated decision of *Conway v Rimmer* in 1968.<sup>111</sup> In 1995 the House of Lords described *Duncan v Cammell Laird* as having had ‘dangerous consequences’.<sup>112</sup> Moreover, the principle that national security claims must be capable of judicial determination is also a requirement of European human rights law. Ministerial certificates that have the effect of conclusively determining proceedings on national security grounds have been held to be incompatible with both EU law and the European Convention on Human Rights.<sup>113</sup>

We can now see the problem starkly, and it arises from a clash of legal cultures. The United States has become accustomed to a legal regime which, as exemplified in *El-Masri* and *Mohamed and Others v Jeppesen Dataplan Inc*, effectively operates as an absolute bar to the disclosure or examination of material which relates to the operation of the intelligence services, since their actions are regarded as classified. In contrast, the judgments of the Divisional Court and the Court of Appeal in *Binyam Mohamed* are firmly located within the context of the common law and European rule of law culture. The matter was perhaps put most clearly by Lord Judge CJ, who indicated in *Binyam Mohamed* that he had been ‘unable to eradicate the impression’ that the Court was being invited by the Government to accept that once the Secretary of State has made his judgement that matters must be kept secret, ‘as a matter of practical reality, that should be that’. Lord Judge reminded the Secretary of State that, although his views were entitled to great respect, ‘they cannot command the unquestioning acquiescence of the court’. The consequence, he explained, was that<sup>114</sup>

in our country, which is governed by the rule of law, upheld by an independent judiciary, the confidentiality principle is indeed subject to the clear limitation that the government and the intelligence services can never provide the country which provides intelligence with an unconditional guarantee that the confidentiality principle will never be set aside if the courts conclude that the interests of justice make it necessary and appropriate to do so.

Whilst the Government purported to accept that the control principle could not be absolute, it appears that it regarded the possibility of disclosure over a claim for PII on national security grounds as theoretical rather than real. It certainly appears that the US administration understood this to be the case and it was, in effect, the position urged upon the Court of Appeal by the Government, as Lord Judge CJ observed.

<sup>107</sup> *Glasgow Corporation v Central Land Board*, 1956 SC (HL) 1, at 18–19 (Lord Radcliffe): ‘the interests of government, for which the minister should speak with full authority, do not exhaust the public interest’.

<sup>108</sup> See, eg, *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090, at 1127 (Lord Edmund-Davies), 1131 and 1134 (Lord Keith) and 1143 (Lord Scarman). At 1143 Lord Scarman described judicial balancing as the very ‘essence of the matter’.

<sup>109</sup> *Duncan v Cammell, Laird & Co Ltd* [1942] AC 624.

<sup>110</sup> *Glasgow Corporation v Central Land Board*, 1956 SC (HL) 1.

<sup>111</sup> *Conway v Rimmer*, [1968] AC 910.

<sup>112</sup> *R v Chief Constable of West Midlands Police, ex parte Wiley* [1995] 1 AC 274, at 289 (Lord Woolf).

<sup>113</sup> See, respectively, Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, [1987] 1 QB 129 and *Tinnelly & Sons Ltd v United Kingdom* (1999) 27 EHRR 249.

<sup>114</sup> [2010] EWCA Civ 65, [2011] QB 218, at [46].

Seen in this context, what the seven paragraphs disclosed, and *even the origin* of the information they contained, was only part of a larger issue. The larger issue was that the UK courts demonstrated that they mean what they have long said: that they are the ultimate guardians of the public interest and the rule of law requires that they have the final say on whether material should be disclosed. This is a position that stands in marked contrast to the approach taken by US courts in the national security context.

This analysis is supported by a further aspect of the *Binyam Mohamed* case which is revealing. The UK authorities did actually disclose a substantial amount of information that had been provided by the CIA, and the Divisional Court referred to such information without objection in its first judgment. Thus, the Divisional Court had referred without objection to information provided by the US authorities relating to Mr Mohamed's detention in Pakistan, confession, transfer, questioning, co-operation, request for a lawyer, and subsequent detention by US officials. The point was raised before the Court of Appeal as demonstrative of the qualified nature of the control principle. The response of the intelligence services was that they were able to judge that these disclosures would not have been found objectionable by the United States, and, they said, were expressed in general terms and disclosed nothing of substance. Lord Neuberger MR stated that he did not find this particularly convincing given that the objection to disclosure of the seven paragraphs was not based on their substance either but that they referred to the content of CIA reports.<sup>115</sup> This serves to emphasise that the heart of the issue was the division of powers: whether courts or the executive should have the authority to disclose sensitive material. This appears to have been more significant even than the origin of the information. Even if the court's assessment of the sensitivity of the material was sound, and might, on another day, have been shared by the intelligence services, it was objectionable to the United States simply in virtue of being an assessment of a court.

This point is illustrated by a further aspect of the litigation which is possibly its most puzzling aspect of all. Not only had communications from the CIA been voluntarily disclosed in the *Norwich Pharmacal* proceedings but information had also been disclosed which, at the same time, was being said to be highly secret by the US Government on the other side of the Atlantic. The statement filed by CIA Director Michael Hayden, dated 18 October 2007, asserting state secret privilege in *Mohamed and Others v Jeppesen Dataplan Inc* claimed that 'any details' of the extraordinary rendition program were secret other than the limited information made public by President Bush. For instance, it stated that the United States had not 'publicly acknowledged whether any of these plaintiffs were ever in CIA custody'. Therefore the fact that Mr Mohamed had been the subject of extraordinary rendition, and had been held in custody in Pakistan, Morocco, and Afghanistan, was itself said to be a US state secret. The declaration also referred to other matters that were secret such as any information which could have tended to confirm whether any particular allied governments had assisted the CIA.<sup>116</sup> The US Government continued to rely on the declarations throughout the proceedings, certifying that they had been affirmed by officials at the highest level.

It is an intriguing feature of this transatlantic tale that, as we have seen, such matters

<sup>115</sup> *ibid*, [165].

<sup>116</sup> 'Formal Claim of State Secrets and Statutory Privilege by General Michael V Hayden, USAF, Director, Central Intelligence Agency', filed in the US District Court for the Northern District of California, 18 October 2007, especially paras [15], [18]–[20].

had been disclosed in the *Norwich Pharmacal* proceedings by the UK Government. They were addressed in witness evidence, documentary disclosure and had even been the subject of open cross-examination of a Security Service witness. Mr Mohamed's detention in Pakistan, transfer to Morocco, the Dark Prison, Bagram and Guantanamo Bay, and the involvement of the UK intelligence services, which were all said by the CIA to be a state secret, incapable of judicial examination, were examined at great length in the UK proceedings and extensively addressed in the Divisional Court's first judgment dated 21 August 2008. This occurred without objection from the UK authorities, indeed, with their cooperation.

Leaving aside the puzzle of how such divergent approaches were taken on different sides of the Atlantic, which on the face of it appears to expose another example of executive over-claiming of secrecy, it serves to emphasise that the nerve struck by the *Binyam Mohamed* case related to the division of powers and not to the content or origin of the information disclosed. From the US perspective, it is one thing for information to be released by the *executive* – in this case the UK intelligence services – but it is considered to be quite another thing for classified information to be released into the public domain by a *court*. For the US authorities, national security and associated secrecy is a matter that lies within the province of the executive. By contrast, the UK courts have long asserted a jurisdiction to oversee claims of secrecy and, moreover, to balance them against competing rule of law imperatives. That this division of powers issue was at the heart of the US backlash against the *Binyam Mohamed* claim draws support from comments made by Kenneth Clarke MP during debates on the Justice and Security Bill: 'the Americans', he said, 'are extremely alarmed about the fact that *we are giving those powers to our judges*' (emphasis added).<sup>117</sup> At the behest of the Americans, the Justice and Security Act 2013 took those powers away from judges and gave them back to the Government.

## VII. THE WIDER IMPACT OF THE NORWICH PHARMACAL ISSUE

Late in June 2012, not long after the Justice and Security Bill commenced its passage through Parliament, the High Court handed down its judgment in *R (Omar and others) v Secretary of State for Foreign and Commonwealth Affairs*.<sup>118</sup> Omar and the other claimants had been charged with murder and other offences in connection with their alleged involvement in a terrorist bombing in Kampala, Uganda, in 2010, in which 76 people were killed. Omar alleged that he was arrested in Kenya and illegally rendered to Uganda and that he was tortured and subjected to ill-treatment in Uganda. The Kenyan and Ugandan authorities denied that he had been detained in Kenya or that he had been mistreated. Omar made an application to the Constitutional Court of Uganda to have the criminal charges stayed as an abuse of process. Because there were indications that UK intelligence services had provided intelligence or other assistance to the Kenyan and

<sup>117</sup> HC Deb, 4 March 2013, col 748. See also the view of Sir Daniel Bethlehem, Foreign Office Legal Adviser at the time of the *Binyam Mohamed* case, who has stated that the fallout from the case was only in part due to the disclosure of the seven paragraphs: 'More serious, in my view, was the decision of the Divisional Court to reject the PII certificate and substitute its own view of the balance of public interest'. *Statement of Sir Daniel Bethlehem QC, on the Justice and Security Bill*, Written Evidence to the JCHR, 15 October 2012, [24].

<sup>118</sup> [2012] EWHC 1737 (Admin) (United Kingdom).

Ugandan authorities, Omar commenced a *Norwich Pharmacal* claim in the High Court in London seeking disclosure of evidence in the possession of the UK Government which would provide the crucial corroboration of his claims.

At a preliminary hearing, Thomas LJ, one of the two judges who had decided the *Binyam Mohamed* case in the Divisional Court, raised a question as to whether it was appropriate for the court to exercise *Norwich Pharmacal* jurisdiction given that there exists a statutory regime for mutual assistance between states in judicial proceedings.<sup>119</sup> This was manna from heaven for the Government, who adopted the argument that the statutory regime did indeed preclude the exercise of *Norwich Pharmacal* jurisdiction in aid of foreign proceedings that are underway, and that where evidence was sought to assist foreign proceedings, a mutual assistance request would have to be made. In a criminal case, the statutory process may be triggered only at the request of a foreign court, prosecuting authority or law enforcement agency (and not at the instigation of an individual). The legislation also offers protection against disclosure certified by the Secretary of State to be prejudicial to the security of the United Kingdom and no balancing of interests is permitted.

In *Omar* the Divisional Court gave judgment rejecting the claim on the merits and also accepting that the existence of the statutory regimes for mutual assistance precluded the exercise of *Norwich Pharmacal* jurisdiction. In February 2013 the Court of Appeal dismissed an appeal and, notably, held that the Court lacked jurisdiction in the light of the statutory regimes.<sup>120</sup> It was therefore found that Parliament had already excluded the *Norwich Pharmacal* jurisdiction and the provisions in the Justice and Security Bill were unnecessary. Maurice Kay LJ stated that:

On the legal analysis I have just expounded, *Binyam Mohamed* was a manifestation of *communis error*. The [Justice and Security] Bill assumes that there is a problem which requires resolution. If the problem does not exist, the parliamentary assumption that it does is equally erroneous.<sup>121</sup>

Whilst the court's analysis of the issue of jurisdiction was not influenced expressly by the fall-out from the *Binyam Mohamed* case, the court placed considerable emphasis on the fact that the statutory regimes precluded judicial balancing of secrecy against competing considerations.<sup>122</sup> The importance of the two different approaches to disclosure had been starkly demonstrated by the *Binyam Mohamed* case.

The Court of Appeal's volte-face in *Omar* might be thought to have consigned the story of the *Binyam Mohamed* case and its repercussions to a cul-de-sac of legal history. However, the repercussions of the case reverberated far further than the law on *Norwich Pharmacal* relief. They fed directly into the provisions of the Justice and Security Act introducing closed material procedure into ordinary civil proceedings.

Closed material procedure was first invented in the context of immigration appeals. A special tribunal called the Special Immigration Appeals Commission was established with powers to hear secret evidence in immigration cases.<sup>123</sup> In order to make such pro-

<sup>119</sup> The Evidence (Proceedings in Other Jurisdictions) Act 1975 (for civil cases) and the Crime (International Co-operation) Act 2003 (for criminal cases).

<sup>120</sup> *R (Omar and others) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 118 (United Kingdom).

<sup>121</sup> *ibid*, [26].

<sup>122</sup> *ibid*, [25].

<sup>123</sup> Special Immigration Appeals Commission Act 1997.



ceedings less unfair, special counsel known as special advocates are instructed to act in the interests of the individual in ‘closed’ hearings but they are not permitted to communicate with the person whose interests they represent unless permission is obtained.<sup>124</sup> This procedure had been extended by statute into other areas, most notably Control Orders and Terrorism Prevention and Investigation Measures (TPIMs).<sup>125</sup> The Justice and Security Act confers on courts a jurisdiction to use closed material procedure in any civil proceedings involving national security sensitive information.<sup>126</sup>

One of the significant features of the statutory schemes which have introduced closed material procedure in particular contexts is that they preclude any balancing of interests in considering whether material should be made ‘open’ and disclosed to the affected individual. If it would be contrary to the interests of national security to disclose the material it cannot be disclosed.<sup>127</sup> This precludes disclosure of information even where the harm to national security concern is clearly outweighed by the interests of justice: perhaps, for example, where it is necessary to make a finding of gross wrongdoing. In the context of immigration powers and TPIMs the wrongdoing of public officials is rarely in issue, but in the context of ordinary civil proceedings the issue is obviously of more relevance, as the *Binyam Mohamed* case well illustrates.

During the passage of the Justice and Security Bill through Parliament the Government made a number of concessions to critics of the Bill and introduced some safeguards. However, one proposal that they steadfastly refused to accept was the introduction of a balancing of interests approach in determining what material should be disclosed once a court has opted to use a closed material procedure. The Act requires that rules of court be made to ensure that ‘material not be disclosed’ if the disclosure of the ‘would be damaging to the interests of national security’.<sup>128</sup> This effectively reverses *Conway v Rimmer* for litigation in the national security context, once the court has declared the case appropriate for closed material procedure. The consequences of this could be very grave indeed.

The recent case of *Secretary of State for the Home Department v CC and CF* demonstrates this clearly. This was a control order/TPIM case and therefore one of the limited types of case where CMP is currently applied under statutory authority. Exceptionally, the case was not solely about whether the two defendants had been involved in terrorism-related activity. The defendants argued that the imposition of control orders on them had been an abuse of process because of the involvement of British officials in what they claim to have been unlawful detention and mistreatment in Somaliland and in their unlawful return to the United Kingdom (where control orders were imposed). Lloyd

<sup>124</sup> For an account of this system see Cole and Vladeck in [chapter eight](#) of this volume. For reasons they explain, special advocates rarely seek permission to communicate with the individual whose interests they represent.

<sup>125</sup> Prevention of Terrorism Act 2005; Terrorism Prevention and Investigation Measures Act 2011.

<sup>126</sup> Section 6.

<sup>127</sup> Special Immigration Appeals Commission Rules (SI 2003/1034), r 4(1). The courts have held that in some contexts prohibition on disclosure has to be read subject to an individual’s rights under Article 6 of the European Convention on Human Rights to know the case against them. This is not the introduction of a balance but a trump, because if the information is necessary to enable a person to answer the case against them it must be disclosed: see especially *AF (No 3) v Secretary of State for the Home Department* [2009] UKHL 28, [2010] 2 AC 269. However, this principle does not always apply. It has for example been held not to apply to immigration or employment matters: *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110; *Tariq v Home Office* [2011] UKSC 35, [2012] 1 AC 452. In *CC and CF* the principle was held not to apply to allegations of abuse of process: [2012] EWHC 1732 (Admin) (United Kingdom).

<sup>128</sup> Section 8(1)(c).



Jones J held that the abuse of process case was not established. He recorded that the position of the Secretary of State was that she neither confirmed nor denied that the UK authorities had been involved in the arrest, detention and return of the defendants. His judgment simply records that, with ‘considerable reluctance I have come to the conclusion that these matters cannot be addressed in my open judgment’.<sup>129</sup> There is no more than that. The defendants lost but they do not know why. The court’s findings of fact on the abuse of process allegations are all ‘closed’. The claimants thus do not know to what extent, if at all, the British authorities were involved in their arrest, detention and deportation. They do not even know what the Government’s case is. The case is under appeal, but it demonstrates at least the extent of secrecy that could result from the Justice and Security Act and stands in marked contrast to the Divisional Court’s judgment in *Binyam Mohamed*.

It should now be clear why this approach was taken in the Act. It was taken to close the lid on the disclosure of sensitive national security information in a variety of cases, not just in *Norwich Pharmacal* claims. For the same reason, the Government resisted proposed amendments that would have permitted the use of closed material procedure only after the PII process had been exhausted. The Government was rarely explicit that the same concerns that had led to the curtailment of the *Norwich Pharmacal* jurisdiction were also influencing the degree of disclosure permitted under closed material procedure. But Kenneth Clarke MP made the connection in response to an amendment that would have introduced a balancing of interests approach. He said it could not be accepted, as it ‘would give rise to the sort of power that promoted our allies’ concerns following the *Binyam Mohamed* case’.<sup>130</sup>

The effect of precluding the courts from undertaking a balance of interests will undoubtedly be to increase secrecy. This is not so much because the courts regularly order disclosure when applying a balancing approach but because the test does not just fall to be applied by the courts but must be applied by the Government when deciding what material it should apply to withhold from disclosure.<sup>131</sup> Although over-claiming of secrecy still occurs, in the main the Government diligently applies the balancing of interests test and the result is more disclosure than would otherwise be made. This is demonstrated by *Binyam Mohamed* because, as explained above, most of the information about the extraordinary rendition of Mr Mohamed was voluntarily disclosed by the Government and was not ordered to be disclosed by the court. In cases where such an approach is not applicable, such as *CC and CF*, the results can be starkly different.<sup>132</sup>

A great deal will therefore turn on how the courts interpret their power to adopt

<sup>129</sup> *Secretary of State for the Home Department v CC and CF* [2012] EWHC 2837 (Admin) (United Kingdom).

<sup>130</sup> HC Deb, 4 March 2013, col 707. There is a significant difference between *Norwich Pharmacal* cases and ordinary civil proceedings. In the latter, the Government will often, although not invariably, be able to avoid disclosure by conceding an issue or withdrawing a case. However, one of the main purposes of the Act was to remove this prospect by enabling the Government to litigate more claims under closed material procedure. Kenneth Clarke MP made the point that the introduction of a balancing test would mean that the prospect would be reintroduced in cases in which the Government did not agree with the decision of a court to order disclosure. While the courts are still able to order disclosure over Government objections under the Justice and Security Act 2013, this is only on the much more unlikely basis that they disagree with the Government’s assessment that it would give rise to a danger to national security.

<sup>131</sup> See *R v Chief Constable of the West Midlands Police, ex parte Wiley* [1995] 1 WLR 274 (United Kingdom).

<sup>132</sup> Of course, the result in terms of disclosure provided can also be precisely the same.

closed material procedure under the Justice and Security Act and how ready they are to accede to Government requests that closed material procedure be employed: because once a court orders a closed material procedure, the curtain of secrecy will descend on the proceedings. The *Binyam Mohamed* case was a significant contributory factor in the adoption of this new model for litigating national security cases in the United Kingdom. Understanding the story of the case is central to understanding the Justice and Security Act and the new shape of national security law in the United Kingdom.

## VIII. CONCLUSION

The transatlantic tale that we have told in this paper has charted the advance and the retreat of the rule of law. In unprecedented litigation, *Binyam Mohamed* prised open an aspect of the post-9/11 relationship between the UK intelligence services and their US counterparts. The light of transparency and accountability was momentarily, but importantly, shone on that relationship. Since then the law has retreated behind statutory bars on disclosure which provide special exemptions and privileges in the context of national security. The most immediate cause has been pressure from the US intelligence community. The most obvious result is a levelling-down of openness and transparency, to a position closer to that found under US law. It has also resulted in the abrogation of an important constitutional principle in the United Kingdom: that it is for independent judges ultimately to decide in legal proceedings whether the public interest demands disclosure.

It is an important part of this story, and one that we should in conclusion make more explicit, that this increase in secrecy in the United Kingdom has occurred not only in relation to the dealings between the UK and foreign government agencies, but also in relation to the conduct of the intelligence services that does not bring the control principle into play. The provisions of the Justice and Security Act apply to national security in general and are not limited to information-sharing or joint operations with intelligence partners. The UK intelligence agencies saw an opportunity to keep their secrets secret, and seized it. The 9/11 terrorist attacks on the United States drew the US and UK intelligence services out of the shadows, but before the law they now retreat, hand-in-hand, into the darkness.



*Navigating the Shoals of Secrecy:  
A Comparative Analysis of the Use of  
Secret Evidence and ‘Cleared Counsel’  
in the United States, the United Kingdom,  
and Canada*

DAVID COLE AND STEPHEN I VLADECK<sup>1</sup>

I. INTRODUCTION

HOW SHOULD LIBERAL democracies committed to the principle that individual liberty should not be denied without fair procedures address the use of ‘secret evidence’ to detain or deport a human being? In *Charkaoui v Canada*,<sup>2</sup> the Canadian Supreme Court engaged in a kind of comparative constitutional analysis in answering this question. In a case challenging Canada’s procedure for deporting foreign nationals on the basis of secret evidence, the Court concluded that the process was not consistent with the Canadian Charter’s guarantee of a fair hearing. Noting that the United Kingdom employed ‘cleared counsel’ in similar circumstances to mitigate the unfairness of secret evidence to the affected individual, the Canadian Supreme Court held that Canada could, and therefore as a constitutional matter, *must*, do more to ensure fairness. In short, the Court reasoned that because the United Kingdom had successfully employed ‘cleared counsel’ to improve the fairness of proceedings involving secret evidence, it was not necessary, and therefore not consistent with the Charter, for Canada to rely on secret evidence without providing ‘cleared counsel’. The Parliament then adopted a process, much like the UK’s (and like other processes already in place in Canada), that authorised lawyers with security clearances to see the otherwise secret evidence and to challenge it on behalf of the affected party in closed proceedings.

Thus, in *Charkaoui*, the Canadian Supreme Court looked to the practice of another nation to inform its judgment about whether Canada was doing all it could to minimise its compromise of fair trial principles. Facing similar security concerns, the United Kingdom was able to protect those concerns while affording greater procedural protections to

<sup>1</sup> An earlier version of this chapter appears in D Cole, F Fabbrini and A Vidaschi (eds), *Secrecy, National Security and the Vindication of Constitutional Law* (Cheltenham, Elgar, 2013).

<sup>2</sup> *Charkaoui v Canada (Citizenship and Immigration)* 2007 SCC 9 [2007] 1 SCR 350 (Canada).

individual liberty than Canada was affording. That fact suggested that it was not necessary to deny those additional protections. A substantially similar requirement that the state provide fundamentally fair procedures when taking liberty can also be found in the jurisprudence of the US Constitution and the European Convention on Human Rights. Accordingly, in this chapter, we propose to engage in comparative borrowing for a similar purpose. An analysis of the ways in which the United Kingdom, Canada, and the United States are using secret evidence and cleared counsel in detention and deportation proceedings sheds critical light on the practices of each. More significantly, it suggests that *none* of the three democracies is doing all that it could to mitigate the costs to a fair hearing of relying on secret evidence. Each country has chosen to employ ‘cleared counsel’ – lawyers with security clearances who are given access to the secret evidence the government seeks to use against the affected individual – in order to increase the adversarial character of the process. But the three nations have adopted distinct practices with respect to the constraints on and powers of cleared counsel. Each of the three nations’ procedures has advantages and disadvantages; none is plainly superior in all respects. But the record each country has developed in deploying these measures demonstrates, at a minimum, that each of the three countries could do more – and therefore as a constitutional and human rights matter *must* do more – to improve fairness without undermining legitimate security concerns.

In all three countries, it has long been established that before the state may deprive an individual of his liberty, it ordinarily must disclose to him or her the evidence on which it bases its actions, and must afford him or her a meaningful opportunity to respond. The right to confront the evidence used to deprive a person of his liberty is essential to fundamental (and indeed, constitutional) notions of fairness. In all three countries, however, the legislature and/or the courts have more recently concluded that in limited situations involving national security, individuals may be deprived of their liberty on the basis of secret evidence that is not fully disclosed to the affected individual. All three nations have sought to address the tension between fundamental fairness and secrecy by letting *lawyers* see the secret evidence, but not the affected parties themselves. The lawyers must be approved by the government for security clearances, and are obligated not to reveal the secret evidence to anyone else, including the affected party. All three systems have concluded that this ‘cleared counsel’ compromise can be implemented without violating fundamental fairness guarantees.

Despite these similarities, however, there are many salient differences in the ways each legal system has chosen to address the issue. A comparative analysis helps to illustrate the range of measures available to mitigate the grave fairness concerns raised by secret evidence. Some of what is done in each system is considered unthinkable in one or more of the others. Yet none of the three systems has yet led to an unauthorised disclosure of secret evidence, suggesting that measures adopted to further fairness in one jurisdiction could be adopted in others without unduly jeopardising secrets. If, as *Charkaoui* and comparable principles in American constitutional law and European Convention law provide, the state is obligated to adopt means that are minimally intrusive on the right to a fair hearing, each state should be required to introduce into its own system aspects adopted in the other systems that improve the fairness of the process without jeopardising security. At the same time, considering all three models together illustrates some core common problems that may well be irreducible once a legal system abandons the fundamental principle that all evidence used to justify the deprivation of a person’s liberty must be disclosed to him.

These experiments in secret evidence and 'cleared counsel' have had the effect of 'normalising' a practice that was, until recently, virtually unthinkable. There is already evidence that the practise is expanding. In the United Kingdom, for example, Parliament recently enacted a bill that expands the use of closed proceedings and 'special advocates' to any civil proceeding in which courts conclude: (1) that sensitive material would be disclosed that would be detrimental to national security, and (2) that 'it is in the interest of the fair and effective administration of justice' that a closed proceeding be conducted.<sup>3</sup> In the United States, courts have accepted the proposition that individuals can be detained indefinitely on the basis of intelligence reports consisting of multiple hearsay, which the detainee himself or herself cannot see, which his or her cleared lawyers can see only in highly redacted form, and which the courts then 'presume' to be accurate.<sup>4</sup> Our review of these practices, which has included interviews with multiple 'cleared counsel' in each jurisdiction, ultimately concludes that this 'normalisation' should be resisted, for there are serious fairness concerns with relying on secret evidence to deprive persons of liberty, even in its least unfair form.

In the United States, the Confrontation Clause and the Due Process Clause generally bar reliance on secret evidence to deprive a person of his liberty. But in the context of detaining enemy belligerents in the armed conflict with Al Qaeda, the government has relied extensively on secret evidence to justify indefinite detention, and the courts have blessed the practice, upholding many detentions on the basis of so much secret evidence that the bulk of their opinions must be redacted for publication.<sup>5</sup> Those detained at Guantánamo Bay have access to habeas corpus review, and in that context courts have extensively addressed how to accommodate the government's interest in maintaining military secrets with the demands of meaningful habeas corpus review. Attorneys are granted security clearances, and permitted to see and confront the evidence the government uses against their clients. They are not allowed to disclose that evidence to their clients, but they are permitted to use that information to guide their investigation and the preparation of their defence in court. There is much dispute about the details of how the process works, and in particular about how wartime intelligence should be assessed as evidence in a court of law.<sup>6</sup> But what seems to have gone virtually unquestioned, at least by the courts, is the very notion that human beings can be locked up, potentially for the rest of their lives, on the basis of evidence and charges they never see.

In the United Kingdom, common law long recognised as fundamental the right to confront the evidence used against one when liberty was at stake.<sup>7</sup> After 9/11, however,

<sup>3</sup> Justice and Security Act 2013, § 6(5). As enacted, the Act was a substantial improvement over the government's initial proposal, but nonetheless has generated substantial criticism for its expansion of 'closed' procedures. See *Justice and Security Green Paper* (October 2011) available: [www.official-documents.gov.uk/document/cm81/8194/8194.pdf](http://www.official-documents.gov.uk/document/cm81/8194/8194.pdf). See generally Adam Tomkins, 'Justice and Security in the United Kingdom' (forthcoming, 2013) *Israel Law Review*, available [ssrn.com/abstract=2274017](http://ssrn.com/abstract=2274017) (arguing that the criticism is exaggerated and that, as amended, the Act is less troubling than some have suggested).

<sup>4</sup> *Latif v Obama*, 677 F 3d 1175 (DC Cir 2012), cert denied, 132 S Ct 2741 (2012) (United States).

<sup>5</sup> See, eg, *Ameziane v Obama*, 620 F 3d 1 (DC Cir 2010) (United States); see also Dafna Linzer, 'In Gitmo Opinion, Two Versions of Reality', *ProPublica.org* (25 April 2011) available: [www.propublica.org/article/in-gitmo-opinion-two-versions-of-reality](http://www.propublica.org/article/in-gitmo-opinion-two-versions-of-reality).

<sup>6</sup> See, eg, *Latif*, 677 F 3d 1175 at 1178–85 (United States) (holding that intelligence reports should be granted a 'presumption of regularity', by which the courts presume that the government's reports accurately report what was said or observed).

<sup>7</sup> See generally Daniel H Pollitt, 'The Right of Confrontation: Its History and Modern Dress' (1959) 8 *Journal of Public Law* 381, 396–97; Tomkins (n 3 above) (providing overview of UK treatment of sensitive evidence in civil proceedings).

Parliament authorised the government to use secret evidence to restrict the liberty of certain suspected terrorists.<sup>8</sup> It initially authorised preventive detention of foreign nationals who were suspected terrorists.<sup>9</sup> When that legal regime was declared incompatible with the European Convention on Human Rights,<sup>10</sup> Parliament authorised the imposition of ‘control orders’, a sort of house arrest, again on the basis of undisclosed evidence.<sup>11</sup> The British legal system has since 1997 also permitted reliance on undisclosed evidence in immigration cases raising national security concerns,<sup>12</sup> and as noted above, now permits closed proceedings in civil lawsuits generally.<sup>13</sup>

The Canadian Parliament authorised the use of undisclosed evidence to certify foreign nationals as threats to national security, which renders them subject to detention and deportation.<sup>14</sup> In *Charkaoui*, as noted above, the Canadian Supreme Court upheld the practice, but required the use of ‘cleared counsel’ to permit some adversarial testing of the secret evidence.<sup>15</sup>

In all three countries, it remains the case that criminal punishment may not be imposed on the basis of undisclosed evidence, because all three countries’ legal systems recognise the fundamental right of the criminally accused to confront all the evidence against him. But each nation has departed from that basic principle in a set of national security cases involving deprivations of liberty short of criminal punishment.<sup>16</sup> It is far from evident that this departure is warranted. The same fairness concerns arise, after all, whether the outcome is a criminal sentence, indefinite detention, indefinite house arrest, or detention and deportation. And the same safety or security concerns are presented whether the government pursues a terrorist using criminal or civil measures. Our review of the practices in each country reveals several ways in which the fairness of ‘secret evidence procedures’ could and should be improved. But at the same time we question whether the decision to permit such a process in the first place was the real mistake.

## II. THE PROCESSES EXPLAINED

### A. Guantánamo Bay Process

Although the United States began detaining non-citizen ‘enemy combatants’ at Guantánamo Bay in January 2002, it was not until after the US Supreme Court’s 2004

<sup>8</sup> Secret evidence was first permitted as part of the Special Immigration Appeal Commission Act 1997, but extended after 9/11 to control order proceedings.

<sup>9</sup> Section 23, Anti-Terrorism, Crime and Security Act 2001.

<sup>10</sup> *A and Others v Secretary of State for the Home Department* [2004] UKHL 56.

<sup>11</sup> Section 1, Prevention of Terrorism Act 2005.

<sup>12</sup> Special Immigration Appeals Commission Act 1997.

<sup>13</sup> Justice and Security Act 2013.

<sup>14</sup> The Immigration and Refugee Protection Act (IRPA).

<sup>15</sup> Israel has pursued a different path, authorising administrative detention based on secret evidence that is shown only to the judge, and not to the detainee or his legal representative. Some have argued that the judges have taken upon themselves the responsibility to address the government’s evidence with a critical eye, see Daphne Barak-Erez and Matthew Waxman, ‘Secret Evidence and the Due Process of Terrorist Detention’ (2009) 48 *Columbia Journal of Transnational Law* 3. That view has been called into serious question by Shiri Krebs, based on extensive interviews with the participants in the process, including the judges. See Shiri Krebs, ‘Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court’ (2012) 45 *Vanderbilt Transnational Law Journal* 639.

<sup>16</sup> See, for example, Prevention of Terrorism Act 2005 (UK) as considered in *Secretary of State for the Home Department v JJ* [2007] UKHL 45; IRPA as considered in *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 [2007] 1 SCR 350; and the discussion of the Guantánamo Bay procedures below.



decision in *Rasul v Bush*<sup>17</sup> that the detainees were first allowed to meet with counsel, and courts first began considering the merits of the detainees' challenges to their confinement. The convoluted and at times circuitous litigation that followed has produced a series of court orders governing a detainee's ability to contest evidence that the government seeks simultaneously to use to justify his detention and to keep secret including from the detainee and the public.<sup>18</sup>

It was settled early on in the habeas corpus litigation that the US government may rely on classified information as part (or even all) of its legal justification for a detention.<sup>19</sup> One of the most significant steps undertaken by the US District Court hearing the Guantánamo habeas petitions was the entry of a protective order to govern the use of classified information in the proceedings.<sup>20</sup>

At the core of the rules fashioned by the courts dealing with the Guantánamo litigation is a cleared counsel model, pursuant to which the detainees' lawyers obtain security clearances, and then have access to information to which their clients – lacking such clearances – do not. However, unless the detainee would otherwise have a right to examine the evidence – either because it is being used against him or her or because it is exculpatory – even the detainee's counsel will not see it. And in cases where such a right exists, the government may keep the evidence from the cleared counsel upon an individualised showing made *ex parte* and *in camera* that the classified information at issue either (1) is highly sensitive; (2) pertains to a highly sensitive source; or (3) pertains to someone other than the detainee.<sup>21</sup> The government can also avoid disclosure of classified evidence to counsel if it can provide alternative, *unclassified* disclosures that are an effective substitute for the information that is properly classified.<sup>22</sup>

Cleared counsel for the detainees are allowed to conduct their own investigations and communicate with their clients after they have seen the classified information relevant to the government's case. They are permitted to formulate questions that may be *informed* by the secret evidence to which they had access, so long as the nature of the question does not disclose the existence or content of the classified information. At the same time, however, counsel is not allowed to disclose any of the confidential evidence itself to their clients or to third parties.<sup>23</sup> One important exception is that detainees' counsel are presumptively permitted to share classified information with other cleared counsel in other Guantánamo habeas corpus cases.<sup>24</sup> Since many cases involve similar or even the same evidence and witnesses, this is a particularly important exception. Yet, in cases involving

<sup>17</sup> *Rasul v Bush* 542 US 466 (2004) (United States) (holding that the US courts have the power to hear habeas petitions filed by non-citizens detained at Guantánamo).

<sup>18</sup> See generally Robert Timothy Reagan, *National Security Case Studies: Special Case-Management Challenges* (2011, Federal Judicial Centre) 118–212 available: [www.fjc.gov/public/pdf.nsf/lookup/TS111114.pdf/\\$file/TS111114.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/TS111114.pdf/$file/TS111114.pdf).

<sup>19</sup> Eg, *Anam v Obama*, 696 F Supp 2d 1 (DDC 2010) (United States) (denying a habeas petition based largely on classified evidence), *aff'd sub nom Al-Madhwani v Obama*, 642 F 3d 1071 (DC Cir 2011) (United States); *Al Odah v United States*, 346 F Supp 2d 1, 8–9 (DDC 2004) (United States); cf *Al Odah v United States*, 608 F Supp 2d 42, 45–46 (DDC 2009) (United States).

<sup>20</sup> *In re Guantanamo Bay Detainee Cases*, 344 F Supp 2d 174 (DDC 2004) (United States). These rules were superseded in their entirety after the Supreme Court's decision in *Boumediene v Bush*, 553 US 723 (2008) (United States). See *In re Guantanamo Bay Detainee Litigation*, 577 F Supp 2d 143 (DDC 2008) (United States).

<sup>21</sup> *Bismullah v Gates*, 501 F 3d 178, 187–88 (DC Cir 2007) (United States); see also *In re Guantanamo Bay Detainee Litigation*, 787 F Supp 2d 5 (DDC 2011) (United States).

<sup>22</sup> *Al Odah v United States*, 559 F 3d 539, 547 (DC Cir 2009) (United States).

<sup>23</sup> *In re Guantanamo Bay Detainee Litigation*, 577 F Supp 2d 143 at 149–50 (United States).

<sup>24</sup> *Ibid*; see also *Bismullah*, 501 F 3d 178 at 187–88 (United States).

‘Top Secret’ or ‘Secure Compartmentalized Information’ – mostly cases involving high-value detainees first held at CIA secret prisons – no presumption operates in this regard, and disclosures to counsel in other cases can be made only by establishing a ‘need to know’ on a case-by-case basis.<sup>25</sup>

There has been substantial wrangling over the secrecy of statements made *by* the detainees themselves, whether to government interrogators, the detainees’ own counsel, or others. The government has argued that all detainee statements are at least presumptively classified, meaning that transcripts of them may not be shown back to the detainees who made them – and that the government’s reliance upon those statements in its responsive filing to a detainee’s habeas corpus petition could itself be kept from the detainee.<sup>26</sup> Although the District Court ultimately rejected this argument as a categorical matter, it allowed the government to argue on a case-by-case basis that certain detainees’ statements were not material, and therefore could properly be withheld from them.<sup>27</sup> The same rules govern situations in which counsel for a detainee wishes to share statements made by the detainee with an outside expert.

## B. Canadian Process

The Canadian Immigration and Refugee Protection Act (IRPA) permits the government to certify certain foreign nationals as threats to the national security, on the basis of undisclosed evidence, and then to deport individuals so certified.<sup>28</sup> The government’s action is subject to judicial review, but the executive is permitted to present evidence *in camera* to the judge that it does not disclose to the individual sought to be deported.<sup>29</sup> Moreover, while the deportation proceedings are pending, or if there are delays in effectuating deportation (often because of difficulty in identifying a country to which the individual can be deported without facing a risk of torture), the foreign national may be detained.<sup>30</sup> Thus, Canada authorises both deportation and detention on the basis of evidence that the affected individual has no right to see or confront.

As noted above, in *Charkaoui* the Canadian Supreme Court ruled that a statute that permitted the government to issue certificates of inadmissibility and defend them in court on the basis of undisclosed evidence violated § 7 of the Canadian Charter by impairing the individual’s right to know the case against him and to respond to it. IRPA authorised the executive to issue certificates on undisclosed evidence, and then permitted courts to review those certificates without disclosing that evidence to the individual or his lawyer, when the judge determined that disclosure would be ‘injurious to national security or to the safety of any person’.<sup>31</sup> IRPA required the judge to provide the affected individual with a summary of the case against him, but the summary could not include

<sup>25</sup> *In re Guantanamo Bay Detainee Litigation*, No 08-442, 2009 WL 50155, at \*1, 9 January 2009 (DDC 2009) (United States).

<sup>26</sup> *In re Guantanamo Bay Detainee Litigation*, 630 F Supp 2d 1 (DDC 2009) (United States); *In re Guantanamo Bay Detainee Litigation*, 624 F Supp 2d 27 (DDC 2009) (United States).

<sup>27</sup> *In re Guantanamo Bay Detainee Litigation*, 634 F Supp 2d 17 (DDC 2009) (United States).

<sup>28</sup> Division 9 of IRPA (‘Certificates and Protection of Information’; ss 76–85).

<sup>29</sup> See especially s 83 of IRPA and Division 9 of IRPA generally.

<sup>30</sup> *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 [2007] 1 SCR 350.

<sup>31</sup> See 2007 SCC 9 [2007] 1 SCR 350, at para 55 (Canada) (quoting IRPA)

any information whose disclosure the judge considered injurious to national security or the safety of any person.<sup>32</sup>

The Court reasoned that the right to have an opportunity to meet the case against one is an essential element of the fair hearing required by § 7 of the Canadian Charter, and that it is insufficient to rely exclusively on the judge in such circumstances to defend the affected individual's interests.<sup>33</sup> Accordingly, it concluded that the statute infringed § 7, but then turned to the question of whether that infringement was justified, under § 1 of the Canadian Charter, by national security concerns. In making this assessment, the Court noted that Canada in other circumstances, and the United Kingdom in very similar circumstances, used 'special advocates' or 'cleared counsel' to improve the adversarial testing of undisclosed evidence.<sup>34</sup> Since this option had been utilised in other settings without any apparent endangerment of security interests, the Court concluded that a procedure that lacked that safeguard did not meet the test of 'minimally impair[ing]' the foreign national's rights.<sup>35</sup>

After *Charkaoui (No 1)*, Canada modified its process to provide for 'special advocates'.<sup>36</sup> As in the United Kingdom, the Canadian cleared counsel are separate lawyers selected and appointed by the state. They are not the affected individual's principal lawyer, and they are sharply limited in their ability to communicate with either the affected individual or his principal lawyer once they have seen the secret evidence. The 'cleared counsel' process in Canada essentially consists of two steps. First, the cleared counsel argues for as much disclosure of the undisclosed evidence as possible. As noted above, under Canadian law the decision on disclosure is the judge's, not the executive's, to make. Once the judge has disclosed as much as she decides can be disclosed, the cleared counsel and the open counsel each offer a response on the merits to the charges, to the best of their ability. The open counsel, however, is privy only to that which has been disclosed.<sup>37</sup>

If cleared counsel seeks to communicate with open counsel, or with the affected individual, he or she must first seek judicial approval, generally from the trial judge that will preside over the case.<sup>38</sup> This requirement creates a substantial disincentive to seek such leave, because doing so may reveal to the judge (and to government counsel) potential vulnerabilities in the individual's case. While courts do grant such leave, they often impose constraints on what can be said and how it can be communicated – for example, requiring the communication to be in writing and approved in advance by the judge. It is possible to ask the trial judge for leave to present a request to communicate to a different judge, and to do so *ex parte*, but both are entirely within the trial judge's discretion. These restrictions on the ability of open and closed counsel to communicate with each other are being challenged as a violation of the Charter in *Harkat*, a case now pending before the Canadian Supreme Court.<sup>39</sup> In that case, counsel maintain, among other

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid.*, at para 63.

<sup>34</sup> *ibid.*, at paras 70–84.

<sup>35</sup> *ibid.*, at para 85.

<sup>36</sup> See especially § 85 of IRPA, an amendment to IRPA following *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350. Further explanation of this may be found in *Charkaoui v Canada (Citizenship and Immigration) (No 2)*, [2008] 2 SCR 326, 2008 SCC 38.

<sup>37</sup> See § 85 of IRPA.

<sup>38</sup> See §§ 85.4 and 85.5 of IRPA.

<sup>39</sup> *Minister of Citizenship and Immigration et al v Mohamed Harkat et al*, No 34884 (Supreme Court, pending) (Canada) [2013].

things, that, just as the separate government counsel handling the open and closed aspects of a case are able to communicate, so, too, should open and closed counsel for the affected individual, and that such communication is essential to ensure a meaningful opportunity to defend on the part of the individual facing deportation and/or detention.

In the Canadian system, cleared counsel are given access not only to the evidence the government affirmatively uses against the affected individual, but to the government's entire case file. Such access is required in all Canadian criminal cases, on the rationale that only the defendant and his attorney can adequately assess what evidence might be helpful to the defence.<sup>40</sup> The same principle has been extended to security certificate cases, as here, too, the individual's liberty is at stake.<sup>41</sup> This is an important feature of the defence, because it means counsel do not have to rely on the state to decide what it will disclose based on the state's guess as to what might be helpful to the defence.

### C. UK Process

In the United Kingdom, 'special advocates' have been used in a variety of settings where the government relies on undisclosed evidence to take action against an individual, including immigration proceedings,<sup>42</sup> hearings on detention and 'control orders',<sup>43</sup> and judicial review of decisions to freeze assets of individuals or groups designated as 'terrorist'.<sup>44</sup> As in Canada, the 'special advocates' in the United Kingdom are a distinct body of lawyers, and once they see the 'closed material', they are presumptively barred from speaking with the affected individual or his or her counsel absent special approval from a court.

'Special advocates' are given access to any evidence the government seeks to use affirmatively against an individual, and any exculpatory information in the government's possession. They then argue for disclosure to the affected individual, both on the ground that the evidence is not properly secret, and on the ground, discussed below, that the affected individual must be given more information in order to provide a sufficient 'gist' of the charges and evidence against him or her, ie, a summary that gives him or her enough information to enable him to instruct his open counsel regarding his defence. Once the judge resolves the disclosure issues, the special advocate and the open counsel will defend the individual on the merits.<sup>45</sup>

According to 'special advocates' who we interviewed,<sup>46</sup> British judges tend not to second-guess the executive on its determination that information is properly secret, but are more willing to rule that disclosures are necessary in order to satisfy the requirement that the individual be afforded sufficient information to meaningfully instruct his law-

<sup>40</sup> *R v Stinchcombe*, [1991] 3 SCR 326 (Canada).

<sup>41</sup> See, eg, *In the Matter of Mahjoub*, DES 7-08, Order, (3 October 2008) (Ottawa Federal Court) (ordering government to file 'all information and intelligence' in its possession relating to Mahjoub).

<sup>42</sup> Special Immigration Appeal Commission Act 1997.

<sup>43</sup> Prevention of Terrorism Act 2005.

<sup>44</sup> Terrorist Asset-Freezing Act 2010.

<sup>45</sup> See in general M Chamberlain, 'Special Advocates and Fairness in Closed Proceedings' (2009) 28 *Civil Justice Quarterly* 314–26.

<sup>46</sup> We conducted lengthy interviews, mostly by telephone, with 12 cleared counsel or special advocates, some from each of the three countries under investigation. All had substantial experience in closed proceedings.

yer. Judges understandably feel more competent assessing how much information an individual must have in order to have a fair opportunity to respond, a determination squarely within their expertise, than to second-guess the executive on its determination about national security risks presented by the disclosure of specific information.

The summary or 'gist' requirement stems from decisions of the European Court of Human Rights,<sup>47</sup> and subsequently, the UK Supreme Court, both of which have recognised that at a bare minimum, the individual must be apprised of the case against him in sufficient detail to allow him to participate in his own defence.<sup>48</sup> In reaching that result in a case reviewing procedures for preventive detention hearings, the European Court of Human Rights rejected the United Kingdom's argument that as long as the evidence was disclosed to the 'special advocate' and the advocate did an effective job in defending the individual, fairness could be satisfied, even if the individual himself was not informed of the evidence. The Court held that the individual who is being deprived of liberty must be afforded a meaningful opportunity to participate in his own defence.<sup>49</sup> The UK Supreme Court has applied that same principle to review of 'control orders', which involve restrictions on liberty short of full-scale detention but nonetheless often very onerous,<sup>50</sup> and the freezing of assets pursuant to 'terrorist' designations.<sup>51</sup> This 'gisting' requirement has led the government to withdraw evidence that it concludes it cannot disclose even in summary form, and has led to the lifting of control orders in several cases.<sup>52</sup> There have been no reported incidents of terrorist activity by individuals who have been released from control orders as a result.

Special advocates in the United Kingdom are critical of the limitations on their ability to assist the affected individual. In December 2011, they filed a joint response to a government proposal to expand reliance on special advocates to any civil litigation in which evidence the government seek not to disclose might be relevant.<sup>53</sup> The special advocates maintained that the limitations imposed on them have made the proceedings 'fundamentally unfair'.<sup>54</sup> These restrictions include the fact that they cannot even ask the affected individual or his open counsel a question without seeking specific approval from the court, with notice to the government. This can be strategically dangerous, because if the individual does not have a good answer, the government and the court will know that he has been asked the question and be able to deduce that he has nothing helpful to his case to say on the subject. Thus, merely posing a question might expose to the government vulnerabilities in a client's case. And special advocates cannot consult with the controllee's lawyer regarding this tactical decision without seeking judicial leave, again with

<sup>47</sup> *A v United Kingdom* (2009) 49 EHRR 29 (ECtHR).

<sup>48</sup> *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28. See Goss in this volume for a fuller account of these decisions.

<sup>49</sup> *A v United Kingdom* (n 47 above).

<sup>50</sup> *Secretary of State for the Home Department v AF (No 3)* (n 48 above); *Her Majesty's Treasury v Ahmed* [2010] UKSC 2.

<sup>51</sup> *Ahmed* (n 50 above).

<sup>52</sup> Daphne Barak-Erez and Matthew C Waxman, 'Secret Evidence and the Due Process of Terrorist Detentions' (2009) 48 *Columbia Journal of Transnational Law* 3, 19, fn 53, citing *Home Secretary v O'Connor* [2009] EWHC Admin 1966, [3] and Frances Gibb, 'Top terror suspect is freed over secrets fear', *The Times*, 7 September 2009.

<sup>53</sup> Justice and Security Green Paper, *Response to Consultation from Special Advocates*, (16 December 2011) available: [reprise.org.uk/media/downloads/2011\\_12\\_16\\_Justice\\_Security\\_Special\\_Advocates\\_Response.pdf](http://reprise.org.uk/media/downloads/2011_12_16_Justice_Security_Special_Advocates_Response.pdf).

<sup>54</sup> *Ibid.*, at para 2; see also Joint Committee on Human Rights, *The Justice and Security Green Paper*, 24th Report of Session 2010–12, at paras 81–86 (also concluding that closed material proceedings with special advocates are fundamentally unfair).

notice to the government. As a result, special advocates feel that they must be very conservative about any efforts at communicating with the affected individual or his counsel, and are therefore often limited to raising questions and objections that can be gleaned from the face of the documents they see. Indeed, they take the view that they cannot even do much independent investigation, because doing so might reveal knowledge they have obtained from the closed material. In practice, special advocates told us, they are limited to internet searches – and even those must be done on secure government computers, lest the searches they conduct reveal something about the content of what they have seen. (Internet searches have sometimes proved useful in demonstrating that information the government claims must be kept secret is actually already publically available.<sup>55</sup>)

### III. APPLICABLE PRINCIPLES

Each jurisdiction studied here is subject to fundamental legal obligations to provide a fair hearing to persons whose liberty or property is being deprived. As noted in the introduction, the Canadian Charter recognises a right to a fundamentally fair hearing in section 7, and requires that any intrusion on that right be minimal in section 1. Thus, if fairness can be improved without undermining security, the existing procedure is not ‘minimally intrusive’, and violates the Charter.

The United Kingdom is governed by the European Convention on Human Rights, which also guarantees a fundamentally fair hearing in Article 6. And as noted above, that requires the state to provide individuals with fair notice and a meaningful opportunity to participate in their own defence where they are being deprived of their liberty.<sup>56</sup> In addition, English common law has long recognised the ‘principle of natural justice’ that individuals are entitled to know the case against them. As the Law Lords put it, this right provides that:

A person or other properly interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by contrary evidence that it is wrong. It cannot be withheld from him in whole or in part.<sup>57</sup>

Under both the ECHR guarantee of a fair hearing and the common law principle, if a particular measure could improve fairness to the individual without undermining the state’s security interest, there would be little reason not to require its implementation.

A similar principle applies in the United States, both as a general matter under the Due Process Clause of the Fifth Amendment and specifically in habeas corpus cases pursuant to the Constitution’s Suspension Clause, which prohibits formal or effective suspensions of the writ of habeas corpus absent extraordinary (and carefully circumscribed) circumstances. In particular, the US Supreme Court has held that in due process analysis

<sup>55</sup> See, eg, Scott Shane, ‘Documents in Plain Sight, but Still Classified’, *New York Times* (24 July 2012) A13.

<sup>56</sup> See also Goss’s contribution (chapter six) in this volume.

<sup>57</sup> *Official Solicitor v K* [1963] Ch 381 (Upjohn LJ) at 405 (United Kingdom). More recently, the UK Supreme Court recognized the principle again, stating: ‘If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them’. *Al Rawi v Security Service* [2011] UKSC 34, at para 12 (United Kingdom) (quoting *Kanda v Government of Malaya* [1962] AC 322, 337 (United Kingdom)).



courts must balance the interest of the individual at stake, the likelihood of error from the process employed, and the costs to the state's interests from providing greater process.<sup>58</sup> If a specific procedural reform would further the individual's interest in fairness and reduce the likelihood of error *without* significantly jeopardising the government's security interests, the constitutional balance would require that procedure to be implemented.<sup>59</sup>

The US Supreme Court has not yet ruled on whether the detainees at Guantánamo, as foreign nationals outside US borders, have constitutional due process rights. It has, however, ruled that they are constitutionally entitled to habeas corpus.<sup>60</sup> Habeas corpus, the Court ruled, has its own constitutionally guaranteed minimal requirements: detained individuals must be afforded a meaningful opportunity to challenge the legality of their detention.<sup>61</sup> The guarantees of habeas corpus and due process may be interrelated, such that the less process that is afforded at the administrative level, the more process is necessary at the judicial review stage to ensure meaningful habeas review.<sup>62</sup>

Where secret evidence is employed to justify detention, the Suspension Clause should compel any additional process necessary to ensure a meaningful opportunity to challenge the underlying detention, especially where such additional process does not materially interfere with the government's security interests. Whatever else the Supreme Court meant by a 'meaningful' opportunity to challenge detention, it would appear to incorporate comparable principles to those articulated in the British and Canadian contexts.

#### IV. IDENTIFYING 'BEST PRACTICES'

All three nations have sought to mediate the tension between fairness and secrecy by granting 'cleared' lawyers access to the evidence, and then imposing on those lawyers restrictions on their ability to share that evidence with others, including, most significantly, their clients. There are many differences, however, in the ways each nation has structured this compromise. Each system has advantages and disadvantages. At a minimum, therefore, a comparative analysis might help to identify 'best practices', namely, those features that maximise fairness to the affected individual without unduly jeopardising security concerns. But identifying such 'best practices' ought not to be of merely practical interest. Because the use of secret evidence so directly compromises the fundamental principle that individuals should be able to see and confront all the evidence used against them, those compromises should be, as the Court in *Charkaoui* put it, 'minimally intrusive' on the individual's right to a fair process. Where one nation has demonstrated that practices more conducive to fair processes can be undertaken without unduly compromising security, the other nations should be required, by constitutional or ECHR law, to

<sup>58</sup> *Mathews v Eldridge*, 424 US 319 (1976) (United States); see also *Hamdi v Rumsfeld*, 542 US 507 (2004) (plurality opinion) (United States) (applying the *Mathews* test to ascertain the amount of process to which a citizen is entitled to challenge his military detention without trial as a terrorism suspect).

<sup>59</sup> See *Wilkinson v Austin*, 545 US 209 (2005) (United States).

<sup>60</sup> *Boumediene v Bush*, 553 US 723 (2008) (United States).

<sup>61</sup> *ibid.*, at 779.

<sup>62</sup> See Brandon Garrett, 'Habeas Corpus and Due Process' (2012) 98 *Cornell Law Review* 47; see also Joshua Alexander Geltzer, 'Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After Boumediene and the Relationship Between Habeas Corpus and Due Process' (2012) 14 *University of Pennsylvania Journal of Constitutional Law* 719. See generally *Boumediene*, 553 US 553, at 782–83.



adopt those measures as well, or at a minimum to meet a heavy burden of justifying why such a procedure would not be practicable in their jurisdiction.

### A. Advantages of US System

The principal advantages of the US system are two-fold: first, the client's attorneys *themselves* are given security clearances, and are permitted to continue consulting with their clients after seeing the secret evidence – subject to rules barring disclosure of the evidence to clients or others. Second, an individual detainee's lawyer is allowed to coordinate with other cleared counsel for other detainees in most cases. By contrast, the inability of UK and Canadian 'cleared counsel' to consult with the client or the client's lawyer is perhaps the single biggest obstacle to mounting an effective defence in those jurisdictions. The fact that hundreds of habeas attorneys in the US have been afforded security clearances and been permitted to maintain their attorney-client contacts in connection with the Guantánamo litigation suggests that the barrier erected in the UK and Canada is unnecessary, and that justifications for insisting upon separate 'cleared' counsel and open counsel are ultimately unavailing.<sup>63</sup>

This is not to say that Guantánamo counsel are unhindered. They have repeatedly challenged the legal, practical, and logistical limitations on their representation. An attorney-client relationship requires candor and trust, and that can be difficult to develop where one's client has been labeled the 'enemy' and often badly mistreated. Moreover, it is often difficult to mount an effective response to government allegations or evidence without being able to ask one's client about it directly. And no amount of access by cleared counsel can make up for the inability of the client himself to confront the evidence. Still, it is certainly better to start with the presumption that one can communicate with one's client than to start with the opposite presumption. And the Guantánamo lawyers have learned that their questioning can often be guided usefully by the closed evidence without impermissible disclosures. For example, if the closed evidence includes an allegation that in March 2002 the client was in a terrorist training camp, the lawyer cannot ask his client, 'were you in a terrorist training camp in March 2002?' But he can get the information in a less direct way by asking the client, 'where were you in 2000? 2001? 2002?' To be sure, this is not always a solution. If the veracity of a particular informant is at issue, for example, it's not clear how counsel could ask his client what he knows about the informant without revealing the informant's identity. But it is certainly a fairer process than the presumptive barriers imposed by appointing separate lawyers as 'cleared counsel' and isolating them both practically and legally from the client and his open counsel, as Canada and the United Kingdom do.

<sup>63</sup> In an informer's privilege case, the Canadian Supreme Court ruled that defence counsel in a criminal case could not be granted access to closed material on the condition that they not disclose it to their clients, because that would create an ethical conflict if they discovered evidence that would be helpful to their client and could not share it with him. The Court provided that other measures, including separate cleared counsel, should be pursued where disputes as to closed material arise in criminal cases. *R v Basi*, [2009] 3 SCR 389 (Canada). In the United States, the practice of granting habeas attorneys access to closed material on condition that they not share it with their clients has not led to any ethical violations, although there are certainly ethical concerns raised by the practice. These concerns, however, and how they should be weighed against a fair hearing for the individual whose liberty is at stake, are beyond the scope of this chapter.

Cleared lawyers in the Guantánamo habeas cases have also been able to share classified information across individual cases, so long as that sharing takes place in a secure facility. This means that lawyers can share notes about common allegations, informants, or sources of information. The lawyers are not, of course, allowed to share this information beyond their circle of security-cleared counsel, but our interviews suggest that this ability to share information across cases has often substantially assisted in the investigation and presentation of specific detainees' defences – to say nothing of the ability to identify common problems encountered by separate counsel. This may be of particular value in the Guantánamo situation, where many of the detainees' cases involve common factual issues, but of less value in countries where evidence is less likely to be relevant across a number of cases. And yet, given the relatively small number of cleared counsel in the UK and Canada, it would seem that there should be a presumption that cleared counsel can at least communicate with each other about potentially common factual issues – especially if, unlike in the US, they are prohibited from consulting with the individual in question or their open counsel.<sup>64</sup>

## **B. Advantages of UK and Canadian systems**

The chief advantage of the UK and Canadian systems over the US system is the requirement that the client be apprised of the charges and evidence against him in sufficient detail to permit him to 'instruct' his lawyer, that is, to participate meaningfully in his defence. This is a critically important principle that is thus far entirely lacking in the US Guantánamo habeas corpus cases. Under the rules governing habeas corpus review, a detainee could face imprisonment for the rest of his life without ever being informed of the basis for the case against him. There is no requirement that the detainee be afforded access to any of the secret evidence. As the European Court of Human Rights recognized in *A*,<sup>65</sup> the right to a fair hearing encompasses the right of the affected individual to meet the case against him; if information is provided exclusively to an attorney who is then barred from sharing that information with the client, the client has not been afforded either notice or a meaningful opportunity to respond.

In addition, the courts in both the United Kingdom and Canada have authority to review classification decisions, and can order information disclosed if they determine that its disclosure will not undermine the public interest or national security. In Canada, cleared counsel report that over time, and likely because of the involvement of cleared counsel in advocating for disclosure, courts have become somewhat more demanding in their review of classification decisions, and have increasingly overturned government classification decisions. In the United Kingdom, the special advocates report that while the courts in theory can overrule the executive on whether disclosure would undermine national security, they rarely do so, and it is less clear how much the power of courts to second-guess actually means in practice. However, courts in both countries have, again girded by arguments of the special advocates, insisted that the executive disclose more to meet its 'gisting' obligations.

<sup>64</sup> Baher Azmy, 'The Pedagogy of Guantanamo' (2011) 26 *Maryland Journal of International Law* 47, 55–60.

<sup>65</sup> *A v United Kingdom* (n 47 above).

In the United States, by contrast, judges frequently treat executive classification decisions as either formally or practically immune from judicial second-guessing. They consider themselves ill-equipped to assess an executive determination that sufficient information must be kept secret, and as yet they have not imposed a requirement that information be disclosed in order to provide the detainee an adequate opportunity to participate in his or her own defence. Although US law does recognize an absolute right on the part of a criminal to confront evidence against him or her, such a right has thus far been traced solely to the Sixth Amendment's Confrontation Clause, which is limited to criminal cases and does not apply in civil proceedings such as the Guantánamo habeas cases.<sup>66</sup> But a 'gisting' requirement is arguably required by either due process or habeas corpus, and it is striking that US courts have not so ruled.

Finally, as noted above, special advocates in Canada are afforded access to the full intelligence file on the affected individual, and not just to the evidence the government seeks to use and exculpatory evidence, as is the case in the United States and the United Kingdom.<sup>67</sup> This is an important advantage, as it puts the special advocate and the government on the same footing regarding the government's evidence, allows the defence counsel to make his or her own assessment of what evidence might be helpful to the client, and permits the cleared counsel to make arguments based on contradictions in the government's own files. In theory, the requirement to disclose exculpatory evidence should achieve the same ends, but battles over what is exculpatory are legion, with prosecutors almost invariably taking a much narrower view of what is exculpatory than the defence. Given the constraints on the individual participating in his or her own defence, and on the ability of cleared counsel to conduct investigation, it seems particularly apt to require the government to disclose to cleared counsel its full intelligence file in secret evidence cases. In the US, lawyers spend inordinate effort fighting for access to potentially exculpate information, and even when they have clearances, much of the evidence they obtain is heavily redacted, on grounds that the government will not be using the redacted information, and it is not exculpatory, and therefore defence counsel do not have a 'need to know' the redacted information.

Thus, each system could learn from the experiences of the other systems, and could increase fairness to the affected individuals without unduly undermining security. None of the countries has reported any significant security breaches from its respective systems. As each country's fundamental laws require that intrusions on the individual's right to know the case against him be as 'minimal' as possible, these practices are relevant not only as guides about how to construct the best 'special advocate' system, but also as evidence supporting an argument, founded in the Canadian or US constitutions or the European Convention on Human Rights, that more process is due than is currently afforded by any of these three countries.

## V. COMMON PROBLEMS

While a comparative analysis provides some suggested improvements for all three countries, it also reveals a raft of shared problems that raise fundamental questions about whether the 'cleared counsel' model is inescapably flawed.

<sup>66</sup> See, eg, *Turner v Rogers*, 131 S Ct 2507, 2516 (2011) (United States).

<sup>67</sup> *R v Stinchcombe*, [1991] 3 SCR 326 (Canada).

The first problem is that there is inadequate checking of the executive branch's authority to declare that certain information must remain confidential.<sup>68</sup> While courts in the United Kingdom and Canada have the authority to review such assessments, the special advocates we interviewed reported that the reviews tend to be quite deferential on the question of whether disclosure would implicate national security. In the US, for all intents and purposes, the executive exercises *carte blanche* in making these determinations. Almost everyone who comes into contact with the classification systems complains that they are skewed to over-classification.<sup>69</sup> It is much easier to declare information secret than to declare that it can be disclosed. And there is little incentive to disclose if there is no meaningful oversight, and if nondisclosure gives the executive an advantage in court, before the legislature, or in the public debate. This is a problem that extends far beyond 'cleared counsel' procedures, of course, but the existence of a 'cleared counsel' option may have the perverse effect of reducing incentives to declassify, because it lends legitimacy to a system that relies heavily on undisclosed evidence, and reduces the pressure to declassify.

Second, all 'cleared counsel' procedures deny to the affected individual the right to notice of the evidence against him or her and an opportunity to meet it. This has inescapable fairness costs to the affected individual, and also may undermine the accuracy of the outcome by permitting decisions to be predicated on evidence that is not subject to full adversarial testing. The affected individual is often in the best position to know how to respond to evidence that implicates him in some wrongdoing, so excluding him may undermine the accuracy of the outcome. In addition, there is an intrinsic value to knowing the grounds upon which one's liberty or property have been deprived, even if one has nothing to say in response; it is an essential element of fairness wholly apart from its instrumental function.

The 'cleared counsel' systems attempt to offset these costs in some measure, but at the end of the day they accept a system in which people can have their liberty or property taken without being able to know the case against them. The 'gisting' requirement imposed by the European Court of Human Rights is a critical check on this, by requiring that the individual be afforded notice not of all the evidence against him, but of sufficient evidence, and in sufficient detail, to permit him to participate in his own defence. The meaning of that guarantee in practice, however, remains to be seen.<sup>70</sup>

Third, all of the 'cleared counsel' models undermine the principle that justice should be open and transparent, particularly when the State is imposing onerous coercive burdens on individuals. The notion that justice should be public, known as the 'open justice' principle, is a fundamental principle of the common law.<sup>71</sup> In its absence, there is sharply limited public awareness of what is actually going on in closed cases. Whatever happens behind closed doors remains there. The public will often have limited or no access to the crucial determinative facts and issues in a case. Thus, the opinions issued by the US federal courts reviewing Guantánamo detentions are often heavily redacted (if

<sup>68</sup> See, eg Special Advocates' Response at para 37 (complaining about the 'inability effectively to challenge non-disclosure').

<sup>69</sup> See generally Steven Aftergood, 'Reducing Government Secrecy: Finding What Works' (2009) 27 *Yale Law and Policy Review* 399, 401–407.

<sup>70</sup> See Goss's [chapter six](#) of this volume.

<sup>71</sup> *Al Rawi*, n 57 above at paras 10–11.

they are publicly released at all), rendering it virtually impossible for an outside reader to assess the opinion's validity.<sup>72</sup> The public interest in open justice is not mitigated by providing lawyers security clearances to increase the fairness of closed-door justice. It's still behind closed doors, and to that extent, undermines the legitimacy of the result and the ability of the public to gauge the legitimacy of the result.

Fourth, cleared counsel procedures may make courts more willing to accept evidence whose quality would not be accepted in a public proceeding. When the UK special advocates delineated problems with closed proceedings, they expressly noted the 'lack of any formal rules of evidence, so allowing second or third hand hearsay to be admitted or even more remote evidence'.<sup>73</sup> To similar effect, one of the district judges in the Guantánamo habeas cases concluded a heavily redacted opinion upholding the government's detention of a particular individual with the observation that the (not publicly accessible) evidence was itself 'gossamer thin', 'of a kind fit only for these unique proceedings [redacted] and [with] very little weight'.<sup>74</sup> There is no necessary relation, of course, between the quality of the evidence accepted by a judge and the public nature of the proceedings. But special advocates advised us that much of the evidence adduced in closed proceedings is intelligence that often is second- or third-hand, and often does not identify its source, much less whether the source is credible or obtained its information in a reliable way. In each setting where cleared counsel have been used, such hearsay and intelligence have been deemed admissible, albeit with different judges placing varying degrees of weight upon such evidence. In a closed proceeding, jurists may be more inclined to grant such evidence weight than in a public proceeding in which issues of admissibility and weight could be assessed not only by the immediate hearing participants, but by a broader public. At present, the public has virtually no ability to assess the quality of the evidence relied upon in closed proceedings, to say nothing of other lawyers, legal observers, or jurists in future cases seeking to ascertain what their predecessors actually decided.

## VI. CONCLUSION

The comparative analysis we have sketched here suggests not just that each of the three nations *could* do more to improve fairness without undermining legitimate secrecy concerns, but that, to the extent they can, their constitutional traditions demand that they *must*. Canada and the United Kingdom could give clearances to the affected party's lawyers, not just to independent 'special advocates', and could allow much more communication and investigation once cleared counsel have seen closed evidence – subject, of course, to protective orders barring disclosure of such evidence to persons lacking the requisite clearance. Canada and the United Kingdom could also allow cleared counsel to share information with other cleared counsel where it might be helpful to the defence.

<sup>72</sup> In one case, for example, the redacted opinion ultimately released by the district court granting a detainee's habeas petition was far less skeptical of the government's position than the opinion initially released, only to be withdrawn for security reasons. See Dafna Linzer, 'In Gitmo Opinion, Two Versions of Reality', *ProPublica.org* (25 April, 2011) available: [www.propublica.org/article/in-gitmo-opinion-two-versions-of-reality](http://www.propublica.org/article/in-gitmo-opinion-two-versions-of-reality); see also *Uthman v Obama*, 637 F 3d 400 (DC Cir 2011) (United States).

<sup>73</sup> Special Advocates' Response, at para 17.

<sup>74</sup> *Awad v Obama*, 646 F Supp 2d 20, 27 (DDC 2009), *aff'd*, 608 F 3d 1 (DC Cir 2010), *cert denied*, 131 S Ct 1814 (2011) (United States).

The United States and the United Kingdom could give cleared counsel access to the entire intelligence file, rather than making lawyers fight, often blindly, for access to the information. And US and UK courts could subject the government's decisions that information cannot be disclosed to more rigorous judicial oversight, in order to check the problem of over-classification. The United States, for its part, should require that the detainee be afforded an unclassified 'gist' of the charges and evidence against him that enables him to participate in his own defence and to know the case against him.

Experience thus far suggests that all of these changes could be implemented without unduly jeopardising national security. Moreover, because the Canadian Charter, the US Constitution, and the European Convention on Human Rights all require that intrusions on fair process be narrowly tailored, there is a good argument under each country's fundamental law that these changes are not just wise policy, but obligatory.

That is not to say that the lessons surveyed herein are only relevant for these three countries. But for the reasons surveyed above, there are specific similarities between these nations' existing processes for judicial consideration of secret evidence – and between their respective constitutional and human rights laws – to make the case for comparative 'borrowing' that much more compelling here.

At the end of the day, however, the common problems that all three systems have confronted suggest that perhaps we ought never to have gone down this road in the first place. In all three systems, much could be done to improve a fundamentally compromised system. But the real question is whether the decision to compromise on the right to confront the evidence against oneself is itself fatally flawed. As the UK special advocates argued recently, closed procedures 'are fundamentally unfair; they do *not* work effectively; nor do they deliver real procedural fairness'.<sup>75</sup> That candid judgment, by the very lawyers upon whom the fairness and legitimacy of the process is said to rest, deserves substantial consideration. There may be, in the end, no fair way to allow the government to use secret evidence to deprive an individual of his liberty. But the experiences of the United States, the United Kingdom, and Canada illustrate that more can and should be done to improve the process if it is to be retained.

<sup>75</sup> Response of the Special Advocates, at para 15.





# *The Secret Keepers: Judges, Security Detentions, and Secret Evidence*

SHIRI KREBS\*

*We examined the secret evidence, ex parte. It is impossible to reveal it. Considering the materials that we saw, we cannot say that there is a reason to intervene in the military commander's decision to prolong the administrative detention.*

Justices of the Israeli Supreme Court<sup>1</sup>

## I. INTRODUCTION

‘STARVATION IS A terrible way to die’.<sup>2</sup> Yet for more than six months now, dozens of the 166 Guantanamo Bay detainees have been refusing food.<sup>3</sup> At its peak, 106 detainees have participated in the hunger strike. By the time of writing these lines, 45 of the strikers are still being forced-fed through gastric tubes inserted into their noses while they are strapped into restraint chairs.<sup>4</sup> All of these strikers have been

\* I wish to thank editors Liora Lazarus and Ryan Goss for their valuable comments, and my advisers, Jenny Martinez and Mariano-Florentino Cuéllar, for their advice, guidance and encouragement. I am grateful for the inspiring environment and financial support I received from the Stanford Center on International Security and Cooperation (CISAC).

Some of the data included in this chapter is based on an empirical research project I conducted, which was originally published as: ‘Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court’ (2012) 45 *Vanderbilt Journal of Transnational Law* 639. An earlier and shorter version of this chapter, based on a presentation given in an international conference taking place in Milan on December 2012, was published at: David D Cole, Federico Fabbrini, Arianna Vidaschi (eds), *Secrecy, National Security and the Vindication of Constitutional Law* (Cheltenham, Edward Elgar Publishing, 2013).

<sup>1</sup> The entire wording of the decision in HCJ 2021/10 *Abu-Sneina v Military Court of Appeals*, 8 April 2010 (unpublished decision) (Israel).

<sup>2</sup> Petty Officer 3rd Class Michael, a Navy hospital corpsman. Jane Sutton, ‘Hunger strike at Guantanamo Bay shows signs of weakening’, Reuters, 31 July 2013. Available at: [www.reuters.com/article/2013/07/31/us-usa-guantanamo-hunger-idUSBRE96U1FZ20130731](http://www.reuters.com/article/2013/07/31/us-usa-guantanamo-hunger-idUSBRE96U1FZ20130731) (last accessed: 26 August 2013).

<sup>3</sup> Charlie Savage, ‘15 Held at Guantánamo Are Said to Quit Hunger Strike’, *The New York Times*, 14 July 2013. Available at: [www.nytimes.com/2013/07/15/us/more-guantanamo-detainees-quit-hunger-strike.html?\\_r=0](http://www.nytimes.com/2013/07/15/us/more-guantanamo-detainees-quit-hunger-strike.html?_r=0) (last accessed: 26 August 2013).

<sup>4</sup> *ibid*; Paul Harris et al, ‘How Guantánamo’s horror forced inmates to hunger strike’, *The Observer*, 4 May 2013. Available at: [www.guardian.co.uk/world/2013/may/04/guantanamo-hunger-strike](http://www.guardian.co.uk/world/2013/may/04/guantanamo-hunger-strike) (last accessed: 26 August 2013).

detained, indefinitely (at least potentially), for security reasons, based on secret intelligence information that was never fully revealed to them.

The hunger strike (as well as practices such as force-feeding), raise many moral and legal issues concerning security detentions. A *New York Times* editorial described the strike as a 'collective act of despair', and reported that prisoners on the hunger strike say that they would rather die than remain in the purgatory of indefinite detention.<sup>5</sup> Clearly, the hunger strike is being used by the detainees to contest their indefinite detention, and to bring attention and some sort of oversight to their cases.

This paper focuses on the alternative: an effective and independent judicial review process, which might provide oversight, rule of law limitations, and protections to security detainees. Indeed, the US Supreme Court emphasised in the *Boumediene* case that 'few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person'.<sup>6</sup> Yet not all security detention regimes are subject to independent judicial review; and among those which are subject to judicial review, different judicial review models have emerged. Among the various judicial review models for security detention cases, the Israeli Supreme Court model – known in the legal literature as the 'judicial management model' – has been praised as being 'robust,' 'effective'<sup>7</sup> and 'interventionist'.<sup>8</sup> Practitioners and academics around the world have suggested it as a model to be emulated by other states, including the United States.<sup>9</sup>

My previous study demonstrated some of the inherent deficiencies of the Israeli 'judicial management model'.<sup>10</sup> The study was based on two levels of analysis: (i) a systematic analysis of the Israeli Supreme Court's case law regarding security detentions from 2000 to 2010; and (ii) in-depth interviews with participants in the judicial review process, including Supreme Court Justices, defence lawyers, State Attorneys, Israeli Security Agency representatives, and Palestinian detainees. These interviews provided a unique glimpse into the judicial review process and revealed some of the dynamics behind the scenes.

The study's findings revealed a considerable gap between the rhetoric of a few renowned cases and the actual practice of the Supreme Court in hundreds of previously undocumented and under-analysed decisions. *On the one hand* – and contrary to the common view of an interventionist court – the study revealed that the Court systemati-

<sup>5</sup> 'Hunger Strike at Guantanamo', The Editorial Board, *New York Times* (New York, 5 April 2013): [www.nytimes.com/2013/04/06/opinion/hunger-strike-at-guantanamo-bay.html?\\_r=0](http://www.nytimes.com/2013/04/06/opinion/hunger-strike-at-guantanamo-bay.html?_r=0) (accessed 24 May 2013).

<sup>6</sup> *Boumediene v Bush*, 553 US 723 (2008) (United States).

<sup>7</sup> Aharon Barak, 'Human Rights in Times of Terror – A Judicial Point of View' (2008) 28 *Legal Studies* 493, 500–501; Daphne Barak-Erez and Matthew Waxman, 'Secret Evidence and the Due Process of Terrorist Detentions' (2009) 48 *Columbia Journal of Transnational Law* 3, 20–21; Stephanie Cooper Blum, 'Preventive Detention in the War on Terror: A Comparison of How the United States, Britain, and Israel Detain and Incapacitate Terrorist Suspects' (2008) 4(3) *Homeland Security Affairs* 1, 8; Yigal Mersel, 'Judicial Review of Counter-Terrorism Measures: The Israeli Model for the Role of the Judiciary During the Terror Era' (2006) 38 *NYU Journal of International Law & Politics* 67, 110–13; Itzhak Zamir, 'Human Rights and National Security' (1989) 23 *Israel Law Review* 375, 391.

<sup>8</sup> Stephen J Schulhofer, 'Checks and Balances in Wartime: American, British and Israeli Experiences' (2004) 102 *Michigan Law Review* 1906, 1918.

<sup>9</sup> Barak (n 6 above) 500–501; Barak-Erez and Waxman (n 6 above) 20–21; Blum (n 6 above) 8; Mersel (n 6 above) 110–13; Zamir (n 6 above) 391; Philip B Heymann, *Terrorism, Freedom, and Security: Winning Without War* (Cambridge MA, MIT Press, 2004) 95–96.

<sup>10</sup> Shiri Krebs, 'Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court' (2012) 45 *Vanderbilt Journal of Transnational Law* 639.

cally refrains from issuing release orders, even when clear procedural flaws were documented. *On the other hand*, the study identified the formation of alternative dispute resolution methods, such as mediation and negotiation, as well as ‘bargaining in the shadow of Court’ dynamics.

This chapter presents some of the most important and interesting findings of this study, and analyses their broader implications concerning judicial review of security detentions in Israel and elsewhere. Some of the findings are compared and contrasted with decisions from other jurisdictions, including the Supreme Court of Canada, and the UK House of Lords, which adopted a different model of judicial review – that of the ‘special advocate’ model. This comparison helps to better understand some of the weaknesses of the judicial management model, in particular the way it undermines participation and the possible implications of this weakness. The chapter begins, in Section II, with a description of the theoretical framework relating to security detentions, and introduces the existing judicial review models, as well as the role of secret evidence in these proceedings. Section III briefly describes the security detention regimes adopted and implemented by the State of Israel. Section IV focuses on the reasoning (and the rhetoric) of the Israeli Supreme Court in dozens of reasoned and published decisions concerning security detentions, decided throughout the years (from the foundation of the State of Israel to 2013). Section V then focuses on realising rights of individual detainees, and analyses the outcomes of the cases in relation to the individuals whose liberty was taken. Section VI uses a recent decision to demonstrate the gap between general reasoning of rights and realisation of these rights in individual cases. Section VII complements the reasoning of the decisions and their actual outcomes with the perceptions, opinions and insights of the various participants in the judicial review process, including Justices of the Supreme Court, Intelligence officers, state attorneys, defence lawyers and Palestinian detainees. By combining the reasoning, actual outcomes and ‘behind the scenes’ dynamics, as well as introducing approaches adopted by other courts, this chapter participates in the continuing international debate concerning the impact of schemes of secrecy and confidentiality on the effectiveness of the judicial review process.

## II. SECURITY DETENTIONS, SECRECY AND JUDICIAL REVIEW

Security detention is a preventive mechanism operated by the Executive or military authorities in order to prevent future harm to national security.<sup>11</sup> In accordance with this mechanism, individuals are detained in order to prevent them from committing future crimes or atrocities. Typically, such preventive detentions are based on privileged intelligence information provided by undisclosed sources, and collected secretly by state security agencies. In spite of this infringement of individual liberty and the open justice

<sup>11</sup> Rinat Kitai-Sangero, ‘The Limits of Preventive Detention’ (2009) 40 *McGeorge Law Review* 903, 905. In fact, the literature on security detentions lacks sufficient coherency, and covers a variety of preventive detention regimes (ranging from quasi-criminal proceedings to various forms of ‘executive’ or ‘administrative’ proceedings and to immigration detentions. See, for example, Marc D Falkoff, ‘Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention’ (2009) 86 *Denver University Law Review* 961, 961; Derek P Jinks, ‘The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India’ (2000) 22 *Michigan Journal of International Law* 311, 313.

principle, it has often been argued that states must employ security detentions since criminal law alone is inadequate to combat transnational terrorism.<sup>12</sup>

In the first decade after the emergence of a global 'war on terror', security detentions without criminal charges have become an increasingly popular counter-terrorism mechanism in numerous jurisdictions.<sup>13</sup> The Guantánamo Bay detainees are perhaps the most notorious example,<sup>14</sup> but they are not alone. All around the globe, from India,<sup>15</sup> to Israel,<sup>16</sup> to the Russian Federation,<sup>17</sup> to Australia,<sup>18</sup> states facing terrorist threats are employing some sort of security detention regime. Even Israel, a state which had adopted a system of 'administrative detentions' when it was founded back in 1948 and had successfully implemented this system for decades, introduced new security detention regimes and began using them more widely after the terrorist attacks in the United States on September 11, 2001.<sup>19</sup>

Since security detentions are operated and controlled by the Executive or military authorities, the question of oversight or judicial review becomes critically important. Without a judicial review process, an individual may lose her freedom, potentially forever, based on unchallenged and secret intelligence information. Without independent and effective judicial review hunger strikes might indeed become an individual's only way to draw attention, call for help and actively control his or her own destiny. Judicial review of security detentions becomes particularly important, considering the inherent imbalance between the state and the detainee in this secretive process. As was emphasised by the Israeli Supreme Court in the *Marab* case: 'Judicial review is the line of defence for liberty, and it must be preserved beyond all else'.<sup>20</sup> Nonetheless, several factors join in to challenge the effectiveness and independence of the judicial review process in security detention cases: (i) the state's reliance on secret evidence<sup>21</sup> and ex parte

<sup>12</sup> Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (New York, Penguin Press, 2008) 151–82. Also, Jack Goldsmith and Neal Katyal, for example, call on 'Congress to establish a comprehensive system of preventive detention that is overseen by a national security court'. Jack Goldsmith and Neal Katyal, Editorial, 'The Terrorists' Court', *New York Times* (New York, 11 July 2007) A19.

<sup>13</sup> Kenneth Anderson, 'U.S. Counterterrorism Policy and Superpower Compliance with International Human Rights Norms' (2007) 30 *Fordham International Law Journal* 455, 474–81; Jenny Hocking, 'Counter-Terrorism and the Criminalisation of Politics: Australia's New Security Powers of Detention, Proscription and Control' (2003) 49 *Australian Journal of Politics and History* 355, 355–71; Dominic McGoldrick, 'Security Detention – United Kingdom Practice' (2009) 40 *Case Western Reserve Journal of International Law* 507, 509. For an analysis of preventive detentions in international law and in armed conflict situations, see Ashley S Deeks, 'Preventive Detention in Armed Conflict' (2009) 40 *Case Western Reserve Journal of International Law* 403.

<sup>14</sup> See Johan Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53 *International & Comparative Law Quarterly* 1 (providing background and analysis on Guantánamo Bay detention center).

<sup>15</sup> Derek P Jinks, 'The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India' (2000) 22 *Michigan Journal of International Law* 311, 313.

<sup>16</sup> Itzhak Zamir, 'Preventive Detention' (1983) 18 *Israel Law Review* 150.

<sup>17</sup> Todd Foglesong, 'Habeas Corpus or Who Has the Body? Judicial Review of Arrest and Pre-Trial Detention in Russia' (1996) 14 *Wisconsin International Law Journal* 541.

<sup>18</sup> Jenny Hocking, 'Counter-Terrorism and the Criminalisation of Politics: Australia's New Security Powers of Detention, Proscription and Control' (2003) 49 *Australian Journal of Politics and History* 355, 355–71; Katherine Nesbitt, 'Preventative Detention of Terrorist Suspects in Australia and the United States: A Comparative Constitutional Analysis' (2007) 17 *Boston University Public Interest Law Journal* 39.

<sup>19</sup> See section III.

<sup>20</sup> HCJ 3239/02 *Mar'ab v IDF Commander in the West Bank*, 57(2) PD 349, para 26, 5 February 2003 (Israel) (quoting HCJ 2320/98 *El-Amla v IDF Commander in Judea and Samaria*, 52(3) PD 346, 350 (1998) (Israel)).

<sup>21</sup> Daphne Barak-Erez and Matthew Waxman, 'Secret Evidence and the Due Process of Terrorist Detentions' (2009) 48 *Columbia Journal of Transnational Law* 3, 5; Sarah H Cleveland, 'Hamdi Meets Youngstown: Justice Jackson's Wartime Security Jurisprudence and the Detention of "Enemy Combatants"' (2005) 68 *Alabama Law Review* 1127, 1132–34.

proceedings;<sup>22</sup> (ii) the court's deference to the state's discretion in issues of national security;<sup>23</sup> and (iii) the bias of all decision-makers in favour of detention, given the differential risks of false positives and false negatives.<sup>24</sup> In other words, an incorrect decision is revealed only when the executive authorities or the judge release a dangerous individual who is later involved in a terrorist activity; while an incorrect decision that approves indefinite detention of an innocent individual who would never have committed a terrorist act is not merely invisible, but unknowable.<sup>25</sup> This distinction from criminal proceedings, which deal with past offences, is plain. If an offence has already occurred, a defendant *can* materially prove his or her innocence. But an innocent person wrongly detained based on security threats that may or may not materialise in the future can never prove that he or she would not have engaged in illegal acts if he or she had been free.

In order to confront these challenges, two distinct models of judicial review have emerged: the 'judicial management' model, which was adopted in Israel, and the 'special advocate' model, which was adopted in the United Kingdom, Canada, and, to some extent, the United States.<sup>26</sup> The judicial management model rests on *ex parte* proceedings, in which the judge plays a cardinal role in executing an independent, inquisitorial scrutiny of the secret evidence.<sup>27</sup> The latter model introduces 'special advocates', 'cleared counsel' or government attorneys approved by state security authorities, whose role is to represent the detainee's interests with respect to the secret evidence, and are permitted to confront that evidence in closed proceedings.<sup>28</sup> The special advocate communicates with the detainee before seeing the evidence, but generally is not permitted to do so after he or she has been exposed to the secret evidence.<sup>29</sup>

Cole and Vladeck's chapter in this Part ([chapter eight](#)) contributes to the understanding of the differences between various models of the 'special advocate' system. They compare and contrast the law and practices concerning special advocates adopted in the United Kingdom, Canada and the United States, and assess the model's merits and weaknesses. In this chapter, I will try to shed some light on the alternative judicial management model.

Comparing and analysing the judicial management model and the special advocate model, Professor (and now Supreme Court Justice) Daphne Barak-Erez and Professor Matthew Waxman recently argued that, overall, the special advocate model enhances participation, while the judicial management model is designed to enhance accuracy,

<sup>22</sup> Daphne Barak-Erez and Matthew Waxman (n 7 above) 21; Hamish Stewart, 'Is Indefinite Detention of Terrorist Suspects Really Constitutional?' (2005) 54 *University of New Brunswick Law Journal* 235, 245.

<sup>23</sup> David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (New York, SUNY Press, 2002) 118; Rinat Kitai-Sangero, 'The Limits of Preventive Detention' (2009) 40 *McGeorge Law Review* 903, 912.

<sup>24</sup> Van Harten elaborates on three different weaknesses in this regard: (1) the judge is precluded from hearing additional information that the individual could have supplied had he known the Executive's claims; (2) courts are uniquely reliant on the Executive to be fair and forthcoming about confidential information; and (3) the dynamic or atmosphere of closed proceedings may condition a judge to favour unduly the security interest over priorities of accuracy and fairness. Gus Van Harten, 'Weaknesses of Adjudication in the Face of Secret Evidence' (2009) 13 *International Journal of Evidence and Proof* 1, 1.

<sup>25</sup> Rinat Kitai-Sangero, 'The Limits of Preventive Detention' (2009) 40 *McGeorge Law Review* 903, 909.

<sup>26</sup> See Barak-Erez and Waxman (n 7 above) 18–24; Maureen T Duffy and Rene Provosi, 'Constitutional Canaries and the Elusive Quest to Legitimize Security Detentions in Canada' (2007) 40 *Case Western Reserve Journal of International Law* 531, 541–43; Derek McGhee, 'Deportation, Detention & Torture by Proxy: Foreign National Terror Suspects in the UK' (2008) 29 *Liverpool Law Review* 99, 105.

<sup>27</sup> Barak-Erez and Waxman (n 7 above) 21–22.

<sup>28</sup> *ibid.*, 27–31.

<sup>29</sup> *ibid.*, 27–31.

and can better regulate the detention system across many cases.<sup>30</sup> While other chapters (including the introduction) in this Part cast doubt on the assumption that the special advocate model enhances individual *participation*; this chapter provides empirical data that casts doubt on the validity of the other two assumptions: that the judicial management model enhances *accuracy* and can better *regulate* the detention system across many cases.

### III. SECURITY DETENTIONS IN ISRAEL

Since its founding in 1948, the State of Israel has used several security detention regimes to cope with various national security threats. Over the years, Israel held thousands of individuals – mostly Palestinians from the West Bank and Gaza – in security detention for periods ranging from several months to several years.<sup>31</sup> The highest number of security detainees was documented during the first intifada. In November 1989, Israel was holding 1,794 Palestinians in security detention.<sup>32</sup> During the 1990s, the number of security detainees dramatically decreased, and at the end of the decade there were no more than a few dozen security detainees.<sup>33</sup> In December 2000, 10 weeks after the second intifada had erupted, Israel held 12 Palestinians in security detention.<sup>34</sup> However, in April 2002, during Operation Defensive Shield, Israel detained hundreds of Palestinians in the West Bank.<sup>35</sup> By the end of the year, more than 900 Palestinians were detained.<sup>36</sup> Since then, the number of security detainees has constantly decreased,<sup>37</sup> and only 204 detainees remained in December 2010.<sup>38</sup> Today the number of security detainees stands at 147. Over the years, Israel has also held a few Israeli citizens in security detention, both Arabs and Jews.<sup>39</sup> However, these cases were scarce and most of the Israeli detainees were held for short periods only.<sup>40</sup>

The resort to such an expansive security detention regime was justified by Israel as a ‘state of emergency’ necessity.<sup>41</sup> At its founding in 1948, Israel applied a ‘state of emer-

<sup>30</sup> *ibid.*, 36–46.

<sup>31</sup> These numbers were provided to the Israeli NGO ‘B’tselem’ by the Israeli Prison Service (IPS), according to their obligations under the Freedom of Information Act of 1998. Hamoked Center for the Defense of the Individual and B’tselem, *Without Trial: Administrative Detention of Palestinians by Israel and the Incarceration of Unlawful Combatants Law* (2009), p 13, available at: [www.btselem.org/Download/200910\\_Without\\_Trial\\_Eng.pdf](http://www.btselem.org/Download/200910_Without_Trial_Eng.pdf).

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid.*

<sup>34</sup> *ibid.*

<sup>35</sup> *ibid.*

<sup>36</sup> *ibid.*

<sup>37</sup> One of the main reasons for the dramatic decrease in the numbers of detainees was probably the decision of the Israeli Supreme Court in the *Mar’ab* case discussed below, which prohibited the practice of mass detentions without judicial review. For further analysis of the *Mar’ab* case see Section IV(A).

<sup>38</sup> B’tselem, *Statistics on Administrative Detention*, available at: [www.btselem.org/english/administrative\\_detention/Statistics.asp](http://www.btselem.org/english/administrative_detention/Statistics.asp) (last accessed: 20 August 2013).

<sup>39</sup> Hamoked Center for the Defense of the Individual and B’tselem (n 31 above), at p 66.

<sup>40</sup> *ibid.*

<sup>41</sup> Status: International Covenant on Civil and Political Rights, United Nations Treaty Collection (1 March 2012): [treaties.un.org/Pages/ViewDetails.aspx?mtidsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?mtidsg_no=IV-4&chapter=4&lang=en) (stating Israel’s reservations to the Covenant). ‘Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens.

These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings.



gency' legal regime in its territory, a state of affairs that is valid and implemented in Israel to this day.<sup>42</sup> In 1991, when Israel joined the International Convention on Civil and Political Rights of 1966, it informed the Secretary General of the United Nations that a state of emergency existed within the state, and accordingly declared derogation from the right to personal liberty, as enshrined in the Convention.<sup>43</sup> In its declaration dated 3 October 1991, Israel stated that:

[T]he State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4(1) of the Covenant. The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention. In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision.<sup>44</sup>

This legal regime enables the state, under certain conditions, to derogate from the right to personal liberty.<sup>45</sup> Arguably, under this derogation regime, the state is not limited to the use of criminal detentions, but can also confront individual 'dangerousness' by the use of security detentions, if criminal proceedings are not feasible, for various reasons.<sup>46</sup>

Currently Israel employs three different security detention regimes to detain Israelis, Palestinians from the West Bank, and foreign 'unlawful combatants'. The main differences between these legal regimes relate to the maximum length of each individual detention order, the authority that issues the detention order, the courts that review them, and the promptness and frequency of judicial review. In general, it may be said that the detention regime least harmful to individual freedom is that applying within the Israeli territory; a more harmful regime is that employed by the Israeli military regime in the West Bank; whilst the most harmful is that which applies to alien unlawful combatants.

In Israeli territory, the Emergency Powers (Detentions) Law of 1979 (IDL) applies.<sup>47</sup> Under the IDL regime, the Minister of Defense is vested with the authority to order a

In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4 (1) of the Covenant.

"The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention.

In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision."

<sup>42</sup> *ibid.*

<sup>43</sup> *ibid.*

<sup>44</sup> *ibid.*

<sup>45</sup> International Covenant on Civil and Political Rights, art 4(1), opened for signature 19 December 1966, 999 UNTS 171, 174 (entered into force 23 March 1976).

<sup>46</sup> See HCJ 3239/02 *Mar'ab v IDF Commander in the West Bank*, 57(2) PD 349, paras 21–24, 5 February 2003 (Israel) (discussing the boundaries of criminal and administrative detention, holding that a person may be detained administratively when the circumstances 'raise the suspicion' that the person 'presents a danger to security'); HCJ 7/48 *Al-Karbuteli v Minister of Defense*, 2(1) PD 5, 97 (1949–50) (Israel) (emphasising the severity of this measure, which harms basic human rights, while accepting its necessity during states of emergency, para 13); see also HCJ 5784/03 *Salama v IDF Commander in Judea and Samaria*, 57(6) PD 721, para 7, 11 August 2003 (Israel) ('The [detention] order did indeed come to protect the public's safety and the security of the area, as per section 1(a) of the order. However, it is clear that the administrative detention severely violates the detainees' freedom. The purpose of the order is to ensure that this violation is within legal and constitutional boundaries'.).

<sup>47</sup> Emergency Powers (Detention) Law, 5739-1979, 33 LSI 89 (1979) (Israel).



person's detention without trial for the protection of state security and public safety for a period of up to six months. The detention may be extended indefinitely by issuing repeat orders.<sup>48</sup> The IDL mandates judicial review by the civilian court system;<sup>49</sup> initially, within 48 hours from the time of arrest,<sup>50</sup> and then every three months.<sup>51</sup> Since detention orders are often based on secret evidence, the IDL specifies that while assessing the secret evidence, the reviewing judge is not bound by the regular rules of evidence.<sup>52</sup> In particular, the judge may 'admit evidence not in the presence of the detainee or his representative, or without revealing it to them', if he is convinced that disclosure of the evidence is liable to 'harm the security of the region or public security'.<sup>53</sup>

In the West Bank (and until recently also in Gaza) – an area regarded by Israeli courts as subject to belligerent occupation – military law applies and independently authorises preventive detention.<sup>54</sup> The most recent military order governing preventive detentions in the West Bank is Preventive Detentions Order No 1591 (MDO).<sup>55</sup> The MDO authorises the IDF's military commanders to detain a person for a maximum period of six months when there is 'a reasonable basis to believe that the security of the region or public security' requires it.<sup>56</sup> Here too, the detention may be extended indefinitely, six months at a time.<sup>57</sup> The detainee must be brought before a military judge within eight days to determine whether the detention is justified.<sup>58</sup> Similarly to the IDL regime, the MDO includes a provision permitting the use of secret evidence that is not revealed to the detainee or his or her representative, and permits deviations from the regular rules of evidence.<sup>59</sup> The military court's decision may be appealed in the Military Court of Appeals (MCA) by either the detainee or the military commander.<sup>60</sup> Although, according to the MDO, the decision of the MCA should be the last instance of review for the military commander's decision, a practice has developed over the years of submitting habeas corpus petitions to the Israeli Supreme Court, sitting as High Court of Justice, to review the decisions of the MCA.<sup>61</sup>

<sup>48</sup> *ibid*, Art 2(a).

<sup>49</sup> Mara Rudman and Mazen Qupty, 'The Emergency Powers (Detention) Law: Israel's Courts Have a Mission – Should They Choose to Accept It?' (1989) 21 *Columbia Human Rights Law Review* 469, 470–71; see also Itzhak Zamir, 'Preventive Detention' (1983) 18 *Israel Law Review* 150, 153.

<sup>50</sup> Emergency Powers (Detention) Law Art 4(a).

<sup>51</sup> *ibid*, Art 5.

<sup>52</sup> *ibid*, Art 6. For discussion on secret evidence in Israeli preventive detention proceedings, see Daphne Barak-Erez and Matthew Waxman (n 7 above) 19.

<sup>53</sup> Emergency Powers (Detention) Law Art 6(c).

<sup>54</sup> See, eg, HCJ 7957/04 *Mara'abe v Prime Minister of Israel* (2006) 45 ILM 202, 207 (Israel); HCJ 2056/04 *Beit Sourik Village Council v Government of Israel*, 58(5) PD 807, para 23, 15 September 2005 (Israel); HCJ 3799/02 *Adalah Legal Center for Arab Minority Rights in Israel v GOC Central Command* (2006) 45 ILM 491, 498 (Israel); see also Aharon Barak, 'A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 *Harvard Law Review* 16, 148–60; Daphne Barak-Erez, 'Israel: The Security Barrier – Between International Law, Constitutional Law, and Domestic Judicial Review' (2006) 4 *International Journal of Constitutional Law* 540, 542–48.

<sup>55</sup> Military Order Regarding Preventive Detention (Judea and Samaria) (No 1591), 5767-2007, Art 1 (Israel), available at: [www.btselem.org/sites/default/files/preventive\\_detention\\_military\\_order\\_1591\\_eng.pdf](http://www.btselem.org/sites/default/files/preventive_detention_military_order_1591_eng.pdf).

<sup>56</sup> *ibid*, Art 1(a).

<sup>57</sup> *ibid*, Art 1(b).

<sup>58</sup> *ibid*, Art 4(a).

<sup>59</sup> *ibid*, Arts 7–8.

<sup>60</sup> *ibid*, Art 5.

<sup>61</sup> Esther Rosalind Cohen, 'Justice for Occupied Territory? The Israeli High Court of Justice Paradigm' (1986) 24 *Columbia Journal of Transnational Law* 471, 471.

In 2002, the Israeli Parliament introduced a new security detentions law: the Incarceration of Unlawful Combatants Law of 2002 (UCL).<sup>62</sup> The UCL gives state authorities the power to detain 'unlawful combatants', who are as defined in Article 2 of the law as persons who have taken part in hostilities against the State of Israel, directly or indirectly, or who are members of a force carrying out hostilities against Israel, and who do not satisfy the conditions of prisoner of war status under international humanitarian law.<sup>63</sup> According to the UCL, persons identified as unlawful combatants may be subject to preventive detention for an unlimited period of time if the Chief of Staff believes that their release will harm state security.<sup>64</sup> Article 5(a) determines that within 14 days from the date of arrest, the detainee must be brought before a District Court judge to determine if the detention is justified.<sup>65</sup> A District Court judge must then review the detention every six months.<sup>66</sup> Article 5(e) permits the court to depart from the rules of evidence, including the admittance of evidence without the presence of the detainee or the detainee's lawyer.<sup>67</sup>

All three security detention regimes include a judicial review process before the Israeli Supreme Court. The judicial review process is of a unique design: due to the importance of the right to personal liberty, and unlike other appellate proceedings, the Court examines the case *de novo*, assessing all of the relevant information and analysing all of the relevant evidence, in spite of the fact that it is either an appeal to reverse the District Court's decision (under the IDL and UCL regimes) or a petition to reverse the MCA decision (under the MDO regime).<sup>68</sup> Whether the case is being heard by a sole Justice (IDL and UCL) or by a panel of three Justices (MDO), both the state and the detainee are allowed to plead their case before the Court and to present the Court with all of the relevant materials.<sup>69</sup> They are not restricted to legal matters or to appellate claims.

After both parties plead their case, the Court then conducts, in most cases, an *ex parte* hearing in which the State Attorney presents the secret evidence that is meant to justify the detention.<sup>70</sup> In the absence of the detainee or his attorney, the Court is the one to independently examine the secret evidence and to investigate the Israeli Security Agency (ISA) representatives who collected and assessed the secret evidence.<sup>71</sup> This process has crucial significance in these cases, since in most instances the Court's decision is based on these 20 minutes of *ex parte* hearing, and on the credibility, variety, and strength of the secret evidence presented.<sup>72</sup>

<sup>62</sup> Incarceration of Unlawful Combatants Law, 5762-2002, SH No 1834 p 192, reprinted in Yoram Dinstein and Fania Domb (eds), *Israel Yearbook on Human Rights*, vol 32 (Leiden/Boston, Martinus Nijhoff, 2003) 389.

<sup>63</sup> *ibid.*, art 2.

<sup>64</sup> *ibid.*, art 3(a).

<sup>65</sup> *ibid.*, art 5(a).

<sup>66</sup> *ibid.*, art 5(c).

<sup>67</sup> *ibid.*, art 5(e).

<sup>68</sup> This description of the process is based both on interviews with Supreme Court Justices, state attorneys, and defence lawyers, and on personal observation of dozens of such court hearings.

<sup>69</sup> Krebs (n 10 above) 667.

<sup>70</sup> *ibid.*

<sup>71</sup> *ibid.*

<sup>72</sup> The data was provided to me by the Registrar of the Israel Supreme Court.

#### IV. REASONING RIGHTS: BALANCING SECURITY AND LIBERTY IN THE SHADOWS OF SECRECY

The Israeli Supreme Court has, since 1948, reviewed hundreds of security detention orders, and published dozens of reasoned decisions which crafted, interpreted and implemented the various security detention regimes. In some of its decisions, the Court created *legal constraints* on the Executive, which limited expansive detention regimes, and established legal standards and due process guarantees to protect security detainees from arbitrary or unnecessary detentions. In other cases, the Court set out *instructions concerning the judicial review process* itself, including specific instructions concerning how to handle the secret evidence, the weight that should be attributed to such information, and the delicate balance that should be carefully made between security and liberty.

##### A. Legal Constraints

One of the Court's landmark cases construing the boundaries of security detentions and interpreting the IDL is *Kawasma v Minister of Defense*.<sup>73</sup> In *Kawasma*, the Minister of Defense issued an administrative detention order against Kawasma, who had been acquitted in a criminal trial.<sup>74</sup> The state appealed that acquittal, and in order to keep Kawasma behind bars until the appeal was heard, the state issued an administrative detention order against him.<sup>75</sup> After the detention order was approved by the District Court, Kawasma appealed to the Israeli Supreme Court.<sup>76</sup> In its decision on this case, the Supreme Court emphasised that the power of administrative detention must be exercised with great care, and only in cases where the danger to security is grave and when administrative detention is the only way to avert the danger.<sup>77</sup> The Court concluded that these criteria were not met in the unique circumstances of the *Kawasma* detention order. Therefore, the Court annulled the detention order and ordered the immediate release of the detainee.<sup>78</sup>

A more recent cornerstone in the judicial review of IDL detentions is the decision of the Israeli Supreme Court, sitting as High Court of Justice, in *Anonymous Persons v Minister of Defense*.<sup>79</sup> The petitioners were Lebanese citizens held by Israeli authorities as bargaining chips in an attempt to release an Israeli navigator from captivity.<sup>80</sup> In its decision – reversing its previous judgment on the matter – the Supreme Court held that the desire to release Israelis from captivity does not justify administrative detention.<sup>81</sup> The Court explained that the only lawful means of detaining the petitioners administratively was under the IDL regime, which only allows for detention justified by *individual*

<sup>73</sup> CrimA 1/82 *Kawasma v Minister of Defense*, 36(1) PD 666, 668–69 (1982) (Israel).

<sup>74</sup> *ibid.*

<sup>75</sup> *ibid.*

<sup>76</sup> *ibid.*

<sup>77</sup> *ibid.*

<sup>78</sup> *ibid.*

<sup>79</sup> CrimFH 7048/97 *Anonymous Persons v Minister of Defense*, 54(1) PD 721, 743, 12 April 2000 (Israel).

<sup>80</sup> *ibid.*

<sup>81</sup> *ibid.*

*dangerousness*.<sup>82</sup> Accordingly, the Court determined that without individual dangerousness there was no legal basis to continue detaining the petitioners.<sup>83</sup> This judgment motivated the Knesset (the Israeli Parliament) to introduce a new security detention regime – UCL – which was discussed earlier.

Dealing with the question of the constitutionality of the UCL, the Court, yet again, offered a limiting interpretation of the law, thereby meaningfully narrowing its scope of application.<sup>84</sup> While upholding the law, as well as the specific detention orders against the detainees,<sup>85</sup> the Court determined – against the plain language of the law – that a detention order will only be valid if the state can prove, with clear and convincing evidence, that the detainee poses a *real threat* to the security of the state.<sup>86</sup>

The Court went on to hold that mere association with a terrorist organisation is not enough to be considered an unlawful combatant under the UCL and that a detention will be justified only if the detainee's *own* actions pose a security threat.<sup>87</sup> In this regard, the Court clearly deviated from the purpose of the UCL's framers, whose goal was to empower the Israeli officials to detain any terror organisation member, regardless of his actual actions or the depth of his involvement.<sup>88</sup> Moreover, the Court narrowed the UCL's scope of application by determining that the law cannot apply to citizens and residents of the State of Israel, but only to *aliens* who endanger the security of the state, again disregarding the clear and broadly applicable language of the law.<sup>89</sup>

*Mar'ab v IDF Commander in the West Bank* is another interesting example of legal constraints created by the Court. In this decision, handed down during Operation Defensive Shield in 2002 (an intensive IDF military operation in the West Bank), the Court nullified detention orders that allowed for 12- and 18-day detentions with no judicial review.<sup>90</sup> In its decision, the Court held that according to both Israeli and international humanitarian and human rights law, a detainee must be brought before a judge

<sup>82</sup> *ibid.*

<sup>83</sup> *ibid.*

<sup>84</sup> CrimA 6659/06 *A v State of Israel* (2008) 47 ILM 768, para 3, 11 June 2008 (Israel).

<sup>85</sup> *ibid.*, para 53.

<sup>86</sup> *ibid.*

<sup>87</sup> *ibid.*, para 18.

<sup>88</sup> The Incarceration of Unlawful Combatants Law was originally denominated 'Incarceration of Members of Enemy Forces Not Entitled to Prisoner-Of-War Status' when introduced in 2000. Shlomy Zachary, 'Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?' (2005) 38 *Israel Law Review* 379, 399. The bill was a legislative response to the Israeli court's decision to release the Lebanese detainees in *Anonymous Persons v Minister of Defense* (n 79 above). Although both human rights groups and various Israeli jurists criticised the bill, Prime Minister Ehud Barak vigorously claimed that 'due to the special reality in our region, Israel should have a legal instrument enabling it to hold captive members of enemy forces which in reality could not be held as POWs'. Therefore, the bill was transformed into the Incarceration of Unlawful Combatants Law. As originally written, the mere membership in a 'force perpetrating hostile acts', even to a level that does not pose a threat to national security, was enough for a person to be deemed an 'unlawful combatant'. Zachary (*ibid.*, at 401).

<sup>89</sup> CrimA 6659/06 *A v Israel* (2008) 47 ILM 768, para 11 (Israel). A few months after the release of the Supreme Court's judgment, the Knesset amended the UCL. The most important modifications enabled sweeping and swift detentions of a large number of individuals for a prolonged period if the government declares the existence of 'wide-scale hostilities'. In such a case, the UCL now permits the Minister of Justice to transfer the judicial review authority from the District Court to a special military court. Also, in such circumstances the law authorises an officer holding the rank of at least captain to temporarily order the detention of a person (for a period that will not exceed seven days) if the officer has reasonable basis to believe the person to be an unlawful combatant. Incarceration of Unlawful Combatants Law (Temporary Provision), 5762-2002, SH No 1834 p 192, art 7 (as amended 5768-2008) (Israel). Nonetheless, this article was only valid for two years, and expired in July 2010, before it was implemented.

<sup>90</sup> HCJ 3239/02 *Mar'ab v IDF Commander in the West Bank*, 57(2) PD 349, 5 February 2003 (Israel).

‘promptly’.<sup>91</sup> Accordingly, it ruled that the detention orders, designed to enable the IDF to detain hundreds of Palestinians during the combat operations, were void.<sup>92</sup> Nonetheless, the Court suspended its judgment for a period of six months in order to give the state enough time to reorganise in accordance with the judgment.<sup>93</sup>

## B. Instructions Concerning the Judicial Review Process

The Court has repeatedly held that the delicate balance between national security and individual liberty would change over time in favour of individual liberty.<sup>94</sup> For example, in the unlawful combatants’ law case, the Court declared that:

[E]ven an internment order under the Internment of Unlawful Combatants Law cannot be sustained indefinitely. The period of time that has elapsed since the order was granted constitutes a relevant and important consideration in the periodic judicial review for determining whether the continuation of the internment is necessary. In the words of Justice A. Procaccia in a similar context:

‘The longer the period of the administrative detention, the greater the weight of the prisoner’s right to his personal liberty when balanced against considerations of public interest, and therefore the greater the onus placed upon the competent authority to show that it is necessary to continue holding the person concerned in detention. For this purpose, new evidence relating to the prisoner’s case may be required, and it is possible that the original evidence that led to his internment in the first place will be insufficient’.<sup>95</sup>

In the *Mar’ab* case, the Court emphasised the importance of judicial review and the role of the courts as the defender of personal liberty and due process:

Judicial intervention stands before arbitrariness; it is essential to the principle of rule of law. It guarantees the preservation of the delicate balance between individual liberty and public safety, a balance which lies at the base of the laws of detention . . . [J]udicial review is an integral part of the detention process. Judicial review is not ‘external’ to the detention. It is an inseparable part of the development of the detention itself. At the basis of this approach lies a constitutional perspective which considers judicial review of detention proceedings essential for the protection of individual liberty. Thus, the detainee need not ‘appeal’ his detention before a judge. Appearing before a judge is an ‘internal’ part of the detention [sic] process. The judge does not ask himself whether a reasonable police officer would have been permitted to carry out the detention. The judge asks himself whether, in his opinion, there are sufficient investigative materials to support the continuation of the detention.<sup>96</sup>

In other cases, the Court stressed the importance of a judge thoroughly examining the materials, ensuring that each piece of evidence connected to the matter at hand be sub-

<sup>91</sup> *ibid*, para 48.

<sup>92</sup> *ibid*, para 49.

<sup>93</sup> *ibid*.

<sup>94</sup> *CrimA 6659/06 A v Israel* (2008) 47 ILM 768, para 46 (Israel) (citing HCJ 5784/03 *Salama v IDF Commander in Judea and Samaria*, 57(6) PD 721, para 8, 11 August 2003 (Israel); *CrimFH 7048/97 Anonymous Persons v Minister of Defense*, 54(1) PD 721, 744, 12 April 2000 (Israel)).

<sup>95</sup> *CrimA 6659/06 A v Israel* (2008) 47 ILM 768, quoting HCJ 11006/04 *Khadri v IDF Commander in Judea and Samaria* [47], para 6 (2004) (unpublished decision).

<sup>96</sup> HCJ 3239/02 *Mar’ab v IDF Commander in the West Bank*, 57(2) PD 349 (2003) paras 26, 32 (citations omitted) (Israel). In the *Mar’ab* case, the Court had invalidated a military order allowing for 18- and 12-day detention periods without judicial oversight (*ibid*, para 49). However, the Court gave the state a period of six months to fix the detention orders. *ibid*.

mitted to him, and never permitting quantity of cases to affect either the quality or the extent of the judicial examination.<sup>97</sup> In this regard, the Court emphasised that:

[T]he fact that certain ‘material’ constitutes valid administrative evidence, does not exempt the judge from examining its degree of credibility against the background of the other pieces of evidence, and the entirety of the case’s circumstances. As such, the ‘administrative evidence’ label does not exempt the judge from the need to demand and receive explanations from the bodies that are able to provide them. To say otherwise, would mean to greatly weaken the process of judicial review and to allow for the elimination of liberty for extended periods of time, on the basis of poor and inadequate material.<sup>98</sup>

In a more recent case, the Court dealt specifically with the problem of secret evidence, and with its own practical solutions for this problem, stating that:

The administrative detention entails, more than once, a deviation from the rules of evidence, among other reasons, since the materials raised against the detainee are not subjected to his review. This deviation imposes on the court a special duty to take extra care in the reviewing of the confidential material, and to act as the detainee’s ‘mouth’ where he is not exposed to the adverse materials, and cannot defend himself.<sup>99</sup>

In still another case, the Court openly declared that in these cases the Court itself must become a ‘temporary defence attorney’.<sup>100</sup>

Therefore, according to the leading cases, as well as scholarly understanding of them, the Supreme Court Justices play a dual role: they function as both inquisitorial judges and as the detainees’ lawyers during the *ex parte* hearings.

## V. REALISING RIGHTS: THE OUTCOMES OF JUDICIAL REVIEW RELATING TO THE NAMED INDIVIDUALS

In six different cases the Israeli Supreme Court has released security detainees from detention. The first and second releases came as early as 1949<sup>101</sup> and 1950<sup>102</sup> – shortly after the foundation of the State of Israel, when its security situation was arguably more unstable and while the Israeli state was fighting for its existence. Neither decision was based on substantial reasons relating to the justifications for, or necessity of, the detentions but, rather, on procedural errors including a failure to specify in the detention order the detainee’s place of arrest. (In contrast to these decisions, in a recent UCL case, which will be discussed below, the Court identified four different procedural flaws before upholding the detention order.<sup>103</sup>) The third and fourth decisions to release

<sup>97</sup> *ibid*, para 33 (quoting *Sajadiya v Minister of Defense*, 42(3) PD 801, 821, 8 November 1988).

<sup>98</sup> Daphne Barak-Erez and Matthew Waxman, (n 7 above) 22 (quoting HCJ 4400/98 *Barham v Judge Col Shefi*, 52(5) PD 337, 346 (1998) (Israel)).

<sup>99</sup> *ibid*, 23 (quoting HCJ 11006/04 *Khadri v IDF Commander in Judea and Samaria (sub nom Qadri v IDF Commander in Judea and Samaria)*, para 6 (2004) (unpublished decision) (Israel)).

<sup>100</sup> *ibid*, 23 (quoting HCJ 9441/07 *Agbar v IDF Commander in Judea and Samaria*, para 8 (2007) (unpublished decision) (Israel)).

<sup>101</sup> Ilan Saban, ‘Theorizing and Tracing the Legal Dimensions of a Control Framework: Law and the Arab-Palestinian Minority in Israel’s First Three Decades (1948–1978)’ (2011) 25 *Emory International Law Review* 299, 335 (citing HCJ 7/48 *Al-Karbuteli v Minister of Defense*, 2(1) PD 5, paras 14–15 (1949–50) (Israel)).

<sup>102</sup> *ibid* (citing HCJ 95/49 *Al-Khoury v Chief of Staff*, 4(1) PD 34, 41, 48 (1950) (Israel)).

<sup>103</sup> ADA 1949/09 *Salach v State of Israel* (2009) (unpublished decision) (Israel).

detainees were given in the 1980s.<sup>104</sup> In *Kawasma*, the Court emphasised the importance of internal state oversight and stated that: '[T]he minister of defence should not be a rubber stamp of the ISA [the Israeli Security Agency – S.K.]'.<sup>105</sup>

The fifth decision in this category is a unique case from 1990 – the only recorded case in which the Israeli Supreme Court ordered the release of an MDO detainee. In its brief decision, the Court found that the secret evidence did not justify the continuation of the detention and therefore ordered the release of the detainee.<sup>106</sup> The sixth and final decision is the '*Bargaining Chips*' case discussed earlier, where the Court ordered the release of Lebanese detainees that were detained under the IDL as 'bargaining chips'.<sup>107</sup>

All of these decisions were given before the so-called 'war on terror' era. Unfortunately, it seems that during this period, the sensitivity of the Israeli Supreme Court to procedural flaws in the detention process, as well as its readiness to release detainees whom the state claims threaten the security of the State of Israel, has declined.

In the first decade of the twenty-first century, the Israeli Supreme Court performed judicial review of 322 security detention cases of which none resulted in a judicial decision to release the detainee.<sup>108</sup> The one petition that the Court granted (out of 282 MDO petitions, totalling 0.35 per cent) was a state petition to reverse the MCA's decision to release a detainee.<sup>109</sup> Farhat As'aad Abdullah Mahmud was detained from February 2003 until September 2005 based on secret intelligence information according to which he was an active member of the Hamas terror organisation. On July 2006, less than a year after his release, he was arrested again, based on similar accusations. His security detention was approved by the military court. Mahmud appealed, and the MCA accepted his claims and ordered the state to release him from custody. The decision to release him was based on three main reasons: *first*, the non-military nature of the spokespersonship activities which were attributed to him; *secondly*, the public nature of these activities, which allowed authorities to follow his moves and collect evidence for criminal trial; and *thirdly*, a rejection of the state's assumption that he would necessarily resume his military activities within Hamas. In an unusual and even extreme move, the state decided to submit a petition to the Supreme Court, sitting as High Court of Justice (henceforth Supreme Court), to overrule the decision of the MCA. The Supreme Court, with the consent of both parties, returned the case to the MCA to re-hear the security experts and reconsider its previous ruling. Following the re-hearing, the MCA again found that the secret evidence did not justify the detention and ordered his release. The state returned to the Supreme Court, insisting that the Court hear the case on its merits. Deviating from its well-founded precedent that the Court will only intervene in rare and unique cases, and that the Court will not replace the MCA's judgment with its own, the court reversed the release decision based on its own interpretation of the secret evidence.

<sup>104</sup> ADA 7/88 *A v Minister of Defense*, 42(3) PD 133 (1988) (Israel); ADA 1/82 *Kawasma v Minister of Defense* 36(1) PD 666 (1982) (Israel).

<sup>105</sup> *Kawasma* 36(1) PD at 668–69.

<sup>106</sup> HCJ 907/90 *Zayad v Military Commander in the West Bank*, (1990) (unpublished decision) (Israel).

<sup>107</sup> CrimFH 7048/97 *Anonymous Persons v Minister of Defense*, 54(l) PD 721, 743 (2000) (Israel).

<sup>108</sup> With the exception of the Lebanese Bargaining Chips case described above, which originated in 1994 in an appeal that was denied. In 1997, the Court agreed to rehear the case, and in April 2000 accepted the petitioner's legal claim that the IDL does not authorise the state to detain non-dangerous aliens as 'bargaining chips' for purposes of future negotiations. *Anonymous*, (n 79 above).

<sup>109</sup> HCJ 1389/07 *Commander of IDF in the Judea and Samaria Area v Military Court of Appeals*, 28 February 2007 (Israel).



In its final decision, the Supreme Court determined that the MCA's decision was 'extremely unreasonable', since the secret evidence indicated that Mahmud's activities within the Hamas organisation extended beyond mere spokespersonship. Without elaborating upon those other activities, the Court declared that the respondent's activities were diverse and presented a significant danger to the safety of the area and the public.<sup>110</sup> This case is the only example in a decade in which the Israeli Supreme Court has intervened in an MCA decision in individual detention cases.

The only other case under the MDO regime in which the applicant was partially successful was that of *Mar'ab*, discussed earlier. In this case the Court invalidated military orders that authorised IDF officers in the West Bank to order the detention of a detainee for a period of 12 days (under one order) and 18 days (under another order), without judicial review.<sup>111</sup> However, this declaration of nullification was suspended for a six-month period; moreover, the Court made no order for the release of any of the thousands of individuals that were detained according to these orders.<sup>112</sup>

Regarding the 13 IDL appeals, five (38 per cent) were partly successful: in two cases the Supreme Court shortened the length of the detention orders;<sup>113</sup> in another two cases the Court reversed part of the District Court's legal analysis, thus setting out a binding legal framework for the lower court in accordance with the detainees' legal arguments;<sup>114</sup> the fifth case being the Lebanese *Bargaining Chips* case discussed earlier, in which the Court determined that the IDL did not authorise the state to detain non-dangerous aliens as 'bargaining chips' for purposes of future negotiations.<sup>115</sup>

Of the 27 UCL appeals, only one was partly successful. In *A v State of Israel*,<sup>116</sup> the Court accepted the detainee's argument that he did not fall under the UCL's definition of 'unlawful combatant', since he did not qualify as 'a member of a force carrying out hostilities against the State of Israel'.<sup>117</sup> In his judgment, Justice Jubran determined that in order to be a 'member of a force carrying out hostilities against Israel' it is not enough that the detainee be a member of any hostile organisation. Rather, the detainee must belong to an active and organised terror organisation that consistently carries out terrorist attacks against the State of Israel.<sup>118</sup> But instead of ordering his immediate release, the Court suspended its judgment for 21 days to enable the state to consider alternatives.<sup>119</sup> Here, too, the focus of the case was on clarifying the wording of the law, not on the concrete circumstances of the case and the detainee. In fact, while rejecting the District

<sup>110</sup> *ibid*, para 5.

<sup>111</sup> *Military Commander in the West Bank v Military Court of Appeals* (2007) (unpublished decision) (Israel); HCJ 3239/02 *Mar'ab v IDF Commander in the West Bank* 57(2) PD 349 (2003) (Israel).

<sup>112</sup> *ibid*, para 36.

<sup>113</sup> ADA 10198/09 *Anonymous v State of Israel* (2010) (unpublished decision) (Israel); ADA 2627/09 *Osama Rashek v State of Israel* (2009) (unpublished decision) (Israel).

<sup>114</sup> ADA 4794/05 *Ufan v Minister of Defense*, para 41 (2005) (unpublished decision) (Israel); ADA 4414/02 *Anonymous v State of Israel*, 57(3) PD 673, 677 (2002) (Israel).

<sup>115</sup> See n 107 above. The case, which originated in 1994, brought the release of some of the detainees on April 2000.

<sup>116</sup> Ron Avital, Ido Rosenzweig and Yuval Shany, The Israeli Democracy Institute, 'A.D.A. [Administrative Detention Appeal] 7750/08 *Anonymous v State of Israel*' (January 2009) (see n 117 below).

<sup>117</sup> ADA 7750/08 *A v State of Israel* (2008) (unpublished decision) (Israel). For a discussion of the judgment, see Ron Avital, Ido Rosenzweig and Yuval Shany, 'A.D.A. [Administrative Detention Appeal] 7750/08 *Anonymous v State of Israel*' (2009) 1 *Terrorism and Democracy*, available at: [en.idi.org.il/analysis/terrorism-and-democracy/issue-no-1/ada-%5Badministrative-detention-appeal%5D-775008-anon-v-state-of-israel/](http://en.idi.org.il/analysis/terrorism-and-democracy/issue-no-1/ada-%5Badministrative-detention-appeal%5D-775008-anon-v-state-of-israel/).

<sup>118</sup> *ibid*.

<sup>119</sup> *ibid*.

Court's interpretation of the UCL, the Court accepted the ISA's interpretation of the secret evidence, and determined that it justified the security detention of the detainee under another detention regime – the MDO.

Finally, in five of the cases, the Court shortened the time periods between judicial reviews.<sup>120</sup> In one instance, that of *Salach*, the Court identified four different procedural flaws before upholding the detention order (though shortening the time period between judicial reviews to three months).<sup>121</sup> *Salach* was detained in Gaza on 4 January 2009, during Operation Cast Lead. Only 12 days later an arrest warrant against him – under the UCL detention regime – was issued and signed by the state authorities. The warrant was vague, neither giving reasons for detention nor specifying any of the allegations against Salach. It took two more days to bring Salach before an IDF officer for an initial hearing. The hearing was brief, and it was unclear whether a translator was present. On 27 January, 23 days after his initial arrest, a judicial review process before the District Court was first held. In the hearing, the state authorities refused to share any of the information – including his own (alleged) confession – with Salach or his lawyer, and stated that it would be presented to the court during the *ex parte* hearing. On 3 February the detention order was upheld by the District Court. Based on these many procedural flaws, Salach appealed to the Supreme Court. Only on 30 March, a day before the Supreme Court hearing, was Salach first interrogated by the police in order to examine the possibility of initiating criminal proceedings against him.

The Supreme Court, after considering these many procedural flaws, criticised the way in which the detention process was conducted in this case, and set instructions for the future. It criticised the state for refusing to give Salach the gist of or even a paraphrased version of his own confession, and for failing to consider a criminal prosecution instead of using preventive detention (in light of the existing evidence in Salach's case). Furthermore, the Court stressed that the state authorities should examine the 12-day gap between the initial arrest and the issue of the detention order and strain to prevent such incidents in the future. It also stated that it 'assumes' that the state authorities will investigate Salach's allegations that he and his son were abused by IDF soldiers following his arrest. The Court further emphasised the importance of holding a meaningful hearing immediately after the arrest; providing the detainee with some information on the accusations against him or her; and allowing him or her to respond to these accusations. It criticised the state for holding back information and for failing to provide Salach with the main accusation against him – namely, that he belonged to the Palestinian 'popular front' organisation – until late in the proceedings; and for conducting the first police investigation of Salach only a day before the Supreme Court hearing. Considering these flaws, and especially the possibility of initiating criminal proceedings against Salach, the Court ordered the District Court to review the case again after three months (instead of the mandatory six months.) At the same time, the Court denied the appeal and upheld the detention order, based on the secret evidence that was presented during the *ex parte*

<sup>120</sup> ADA 2595/09 *Sofi v State of Israel*, para 27 (2009) (unpublished decision) (Israel) (ordering to hold the next judicial review process within three months); ADA 6409/10 *Al-Amudi v State of Israel*, para 5 (2010) (unpublished decision) (Israel); ADA 6406/10 *Sarski v State of Israel*, para 5 (2010) (unpublished decision) (Israel); ADA 2156/10 *Anonymous v State of Israel*, para 13 (2010) (unpublished decision) (Israel); ADA 9257/09 *Anonymous v State of Israel*, para 6 (2009) (unpublished decision) (Israel). In the last four cases the Court did not intervene in the timing of the judicial review process *per se*, but ordered the state security authorities to review the necessity of the detention every month.

<sup>121</sup> ADA 1949/09 *Salach v State of Israel* (2009) (unpublished decision) (Israel).

stage of the hearing, despite determining that the dangerousness of the appellant 'is not of a high level'.

Finally, in some of the cases the Court played the role of mediator between the parties, or used non-binding recommendations. In 15 per cent of the cases heard by the Court, it included in its decisions specific '*recommendations*' to the parties. These included calling for the state to reconsider its position; recommending that the state not prolong the detention in the future; or stating that new and updated materials should be considered before issuing a prolonged detention order. In nine per cent of the MDO cases, the Court successfully mediated between the parties and memorialised their agreement or the state's concessions. A typical agreement was that the state would not issue a new detention order at the end of the current detention period, as long as new intelligence information against the detainee was not found. In other cases, although upholding the detention order, the Court's judgment included general instructions on security detentions, such as instructions to the state to interrogate detainees immediately after their arrest (invalidating the state's practice of holding Palestinians in preventive detention for long periods of time without conducting any interrogation).<sup>122</sup>

#### VI. BETWEEN REASONING RIGHTS AND REALISING RIGHTS: *JABER MAMDUCH ABERAH V IDF COMMANDER IN THE WEST BANK*

A recent example demonstrates both the Israeli Supreme Court's rigorous reasoning and willingness to create legal constraints, and its reluctance to realise the individual's rights in particular cases. In the *Aberah* case,<sup>123</sup> the Israeli Supreme Court, sitting as the High Court of Justice, upheld a detention order based on secret evidence in spite of severe flaws, including the refusal of state authorities to provide the detainee with significant un-classified information. Israeli security authorities suspected Aberah of being a member of, and participating in the Hamas terror organisation. Aberah denied these accusations. The evidence the state obtained was insufficient for criminal proceedings. The state responded by issuing a security detention order against him, based on secret intelligence information.

Aberah challenged the detention order before the Military Court. In an effort to refute the secret evidence, his lawyer questioned the military prosecutor in detail about the reason for the arrest, the type of activity attributed to his client, and the duration of his alleged activity, and so forth. The prosecutor did not answer these questions, but declared that everything would be presented to the Court during the *ex parte* hearing. After the *ex parte* hearing, the Court determined the secret evidence to be reliable and convincing, and proceeded to affirm the detention order.

Aberah appealed to the MCA which was sympathetic to his claims, and emphasised the increased duties of the state authorities in security detention proceedings. Furthermore, the MCA determined that these increased duties include answering questions concerning

<sup>122</sup> See, eg, HCJ 1546/06 *Gazawi v Military Commander in the West Bank*, para 6(3) (2006) (unpublished decision) (Israel); HCJ 6068/06 *El-Affi v Military Commander in the West Bank*, para 6(5) (2006) (unpublished decision) (Israel); HCJ 9015/06 *Taweel v Military Commander in the West Bank*, para 4(2) (2006) (unpublished decision) (Israel).

<sup>123</sup> HCJ 317/13 *Aberah v Military Commander in the West Bank* (unpublished decision from 27 January 2013).

the secret evidence to the maximum extent possible without endangering sources and confidential information. Nonetheless, after examining the secret evidence, the MCA found that there was reliable and up-to-date evidence showing Aberah to have been involved in 'dangerous activity that is intended to harm state security'. While finding the state's interpretation of the secret evidence 'correct and appropriate', the Court observed that this conclusion required a 'certain interpretation' of the secret evidence. The MCA upheld the Military Court's decision to affirm the detention order against Aberah.

Aberah submitted a petition to the Israeli Supreme Court. Interestingly, the decision was given by Justice Shoham, who was appointed to the Supreme Court in 2012, and who had previously served on the MCA. In his decision, Justice Shoham reiterated the MCA's determination that the Military Court, as well as the military prosecution, has 'increased duties' to inspect the secret evidence with care, and to offer the defence all possible information provided always that doing so will not harm state security. He emphasised the Court's role as the detainee's lawyer during the *ex parte* hearing, serving as the detainee's mouth, and scrutinising the secret evidence deeply and thoroughly. Once again, the Court emphasised the priority that should be given to criminal proceedings, whenever it is possible, as well as the duty to conduct meaningful investigation at an early stage.

After considering the secret evidence and the nature of the information requested by the defence in this case, the Court determined that there was no reason not to answer the defence's questions, since no threat to state security arose thereby. The Court determined that neither the military prosecution nor the Military Court had fulfilled their duties to the detainee by providing him with all relevant and necessary information. The Court stated that in future cases, the military prosecutor should be well-briefed by the security agency investigators, and be prepared to answer the detainee's counsel's questions in a sincere and genuine effort to provide the defence with the full information, without compromising the secrecy of the confidential material.

Nonetheless, the Court did not return the case to the Military Court for re-hearing, this time with proper defence. Rather, it dismissed the petition and upheld the detention order. While disclosing most of the information to Aberah, the Court did not seem to think that this new development had any impact on the judicial review process. Moreover, the Court examined, *ex parte*, the evidence and determined that the secret evidence was clear and required no 'interpretation' in order to conclude that Aberah was dangerous and should remain behind bars.

The decision of the Israeli Supreme Court in the *Aberah* case emphasises the main weakness of the judicial management model: the Court interprets the secret evidence without any involvement or participation by the detainee, without allowing him or her to defend themselves, and as Justice D stated in the interview – 'without tools' properly to assess the credibility and meaning of the secret evidence. Moreover, the fact that the Court decided the case based on information that should have been delivered to the detainee and his counsel, without allowing the detainee and his counsel to use the information and to respond to it, undermines basic principles of participation and fairness. It remains possible that the Court's decision was correct, as it does that its interpretation of the information was also correct. It might also be that the information would not have been useful to the detainee's case. As it is, we shall never know. It is a matter of fundamental concern that the Court discounted the possibility that information that was wrongfully withheld from the detainee could, potentially, be useful for his defence. This

approach is markedly different from that adopted by the UK House of Lords, following the decision of the European Court of Human Rights in *A v United Kingdom* in which the ECtHR ruled that non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him. In *Home Secretary v AF (No 3)*, the House of Lords identified several policy considerations advocating a rule according to which a trial procedure can never be considered fair if a party to it is kept in ignorance of the case against him. In the Court's words:

The first [policy consideration] is that *there will be many cases where it is impossible for the court to be confident that disclosure will make no difference*. Reasonable suspicion may be established on grounds that establish an overwhelming case of involvement in terrorism-related activity but, because the threshold is so low, reasonable suspicion may also be founded on misinterpretation of facts in respect of which the controlee is in a position to put forward an innocent explanation. *A system that relies upon the judge to distinguish between the two is not satisfactory, however able and experienced the judge* (emphasis added).<sup>124</sup>

Earlier in his decision, Lord Phillips quoted the judgment of Sedley LJ in the Court of Appeal, stressing what should have been obvious – that without well-informed cross-examination, nothing is certain:

It is in my respectful view seductively easy to conclude that there can be no answer to a case of which you have only heard one side. There can be few practising lawyers who have not had the experience of resuming their seat in a state of hubristic satisfaction, having called a respectable witness to give apparently cast-iron evidence, only to see it reduced to wreckage by ten minutes of well-informed cross-examination or convincingly explained away by the other side's testimony. Some have appeared in cases in which everybody was sure of the defendant's guilt, only for fresh evidence to emerge which makes it clear that they were wrong. As Mark Twain said, the difference between reality and fiction is that fiction has to be credible. In a system which recruits its judges from practitioners, judges need to carry this kind of sobering experience to the bench. It reminds them that you cannot be sure of anything until all the evidence has been heard, and that even then you may be wrong. It may be, for these reasons, that the answer to Baroness Hale's question – what difference might disclosure have made? – is that you can never know.

In contrast to the UK special advocate model, the design of the Israeli judicial management model downplays participation and bolsters the judges' ability to determine whether disclosure matters. It builds on an assumption that the judges are capable to determine, independently and without hearing the detainee, whether disclosure matters.<sup>125</sup> Interestingly, the opposing view of the House of Lords decision in *AF* was unanimous, as it was in the Israeli Supreme Court in *Aberah*. While the Israeli judges expressed full confidence in their ability to interpret the information and to assess its potential impact on the case, the Lords agreed, that irrespective of the circumstances, it is impossible for a judge to be confident that disclosure will make no difference.

<sup>124</sup> *Home Secretary v AF (No 3)* [2009] UKHL 28, 63.

<sup>125</sup> Unfortunately, as was revealed in the interviews, it is now evident that even the utmost professional judges are very limited in their ability to interpret secret intelligence evidence. See Section VII(A) *infra*.

## VII. THE SECRET KEEPERS: BEHIND THE CLOSED DOORS OF THE JUDICIAL MANAGEMENT MODEL

The above analysis of the Court's decisions revealed a strong reliance on *ex parte* proceedings and on secret evidence during the administrative detention hearings.<sup>126</sup> As the interviews discussed in the next Section suggest,<sup>127</sup> reliance upon secret evidence and *ex parte* proceedings, as well as the Court's unique dynamics that are developed, has several significant implications for the judicial review process. First, the Court relies on *uncontested one-sided information*, that has not been scrutinised by cross-examination and that the detainees have not been able to challenge as they do not know the exact information against them and the sources of that information. Secondly, the secret evidence creates a *special courtroom dynamic* and trust between the Court and the state representatives. These factors make judicial deference to the security authorities more likely, and further burdens the Court's ability to reject the secret evidence or to disagree with the state's interpretation of it. Third, the scheme of secrecy, together with the high volume of cases, leads to *de-individualisation* of the court's decisions. Fourth, the reliance on secret information and proceedings has wider implications concerning transparency and *open justice* in general. Finally, these unique dynamics have contributed to the emergence of *alternative dispute resolution* techniques, sponsored and encouraged by the Court.

### A. Judicial Management Model and Secret Evidence

In the interviews, almost all of the former Supreme Court Justices expressed at least some level of discomfort with the practice of secret evidence, as well as with the Court's ability to question the ISA position. One Justice emphasised the feeling of unease that accompanied handling these cases,<sup>128</sup> and explained that these hearings are extremely difficult due to their unique *ex parte* and administrative character.<sup>129</sup> He further clarified that for a judge, who is trained in due process, it is very difficult to send someone to prison without trial, and therefore the judges just have to 'do the best they can'.<sup>130</sup> More specifically, regarding the ability of the judge to differ with the ISA interpretation of the secret evidence, Justice D stated:

<sup>126</sup> 95% of the Court's decisions from 2000 to 2010 were based on secret evidence and *ex parte* proceedings.

<sup>127</sup> The 17 interviewees included five retired Supreme Court Justices that served in the Israeli Supreme Court during the period examined in the study (2000–10); four state attorneys (three former and one current), all of whom were representing the State in Supreme Court hearings on preventive detention cases until recently; four defence lawyers – two Israeli Jews and two Israeli Palestinians (each of these groups included one private lawyer and one NGO lawyer); two ISA representatives (one former and one current); and two Palestinians who were previously held by Israel under preventive detention. Most of these interviews were conducted face to face in private meetings, but some were held via telephone. Each interview lasted between 40 and 120 minutes. The direct quotations are taken from interviews in which the interviewees gave their consent to freely use their exact words. Most of the interviews were recorded. While some of the interviewees agreed to be quoted by their full name, I decided against this in order to protect the identities of those who preferred to maintain their anonymity.

For elaborate information concerning the interviews methodology and protocols, see: Krebs (n 10 above) 698–702.

<sup>128</sup> Interview with Justice A, Supreme Court of Israel (20 December 2010).

<sup>129</sup> *ibid.*

<sup>130</sup> *ibid.*

The judges cannot differ with the ISA story. How can I? I don't have the defence lawyer jumping to say 'it never happened', 'this is not true'. My ethos, as a judge, is that I have two parties. Of course, I can think by myself, but I need tools, which are missing . . . for the most part I have very limited tools.<sup>131</sup>

So the judges do 'the best they can' with very limited tools. Unfortunately, this leads to the prevalence of one-sided information, unchallenged by cross-examination or conflicting accounts.

While justices of the Court revealed their difficulties in challenging the secret evidence, defence lawyers considered the hearings wholly inadequate. In Defence Lawyer A's opinion, the *ex parte* hearing is a *sham*, an appearance of justice and nothing more.<sup>132</sup> 'How can substantive justice be achieved, given that the detainee cannot refute the evidence against him?'<sup>133</sup> Defence Lawyer C further demonstrated the dynamics of such proceedings, stating that: 'the state attorneys should also come to the hearing nervous and tense – but they are always very relaxed. They know that no matter what they say or do, they will always win'.<sup>134</sup> All of the defence lawyers that participated in the interviews expressed frustration in the way that the reliance on secret evidence and *ex parte* proceedings influenced their ability to 'fight back' and to challenge the ISA narrative. 'I feel like a blind defence lawyer', and 'I represent my client with two hands tied behind my back' were common metaphors during the interviews.<sup>135</sup> 'The ISA determines the facts',<sup>136</sup> said Defence Lawyer B. He then continued:

There is no judicial discretion here, since the Justices do not know the facts. They don't have the tools to decide what the level of dangerousness is . . . in one of the cases in which I served as defence lawyer, it took the ISA two years to tell him [the detainee] what the allegations against him were. Then, when I asked my client about it, it turned out that it was a murder case that happened near his house, in which he had no involvement with whatsoever. When I brought this to Court and asked the ISA representatives about it – I could tell that the Justices knew nothing about it. I could see their surprise. It then took two more detention orders until he was finally released.<sup>137</sup>

The detainees themselves expressed similar views. 'The ISA determines everything',<sup>138</sup> Detainee B explained. He then further stated:

I turned to the Supreme Court only after I gave up any hope with regard to the military courts. Unfortunately, here, too, it was all about the secret evidence and I did not have any chance.

Detainee A felt the same:

I never knew what the case against me was, or what the evidence against me was. I had no information, and therefore had nothing to say for my defence.<sup>139</sup>

<sup>131</sup> Interview with Justice D, Supreme Court of Israel (22 December 2010).

<sup>132</sup> Interview with Defence Lawyer A (19 December 2010).

<sup>133</sup> Interview with Defence Lawyer B (20 December 2010).

<sup>134</sup> Interview with Defence Lawyer C (22 December 2010).

<sup>135</sup> Interview with Defence Lawyer A (19 December 2010); Interview with Defence Lawyer B (20 December 2010).

<sup>136</sup> Interview with Defence Lawyer D (23 December 2010).

<sup>137</sup> *ibid.*

<sup>138</sup> Interview with 'Mohamed', Palestinian Detainee (12 January 2011).

<sup>139</sup> Interview with 'Yusuf', Palestinian Detainee (12 January 2011).



Surprisingly, state attorneys also felt that the judicial review process in these cases is ‘handicapped’<sup>140</sup> due to the total reliance by the Court on the secret evidence presented during *ex parte* hearings. ‘In some cases even I felt that it was too easy’,<sup>141</sup> said State Attorney A. State Attorney B further clarified: ‘With all the good will on the part of everybody, there is no way to conduct a fair *ex parte* hearing. The human nature and the dynamic of the process prevent fair hearing of the case’.<sup>142</sup>

## B. Judicial Management Model and Courtroom Dynamics

As revealed by the interviews, excluding the defence lawyer and the detainee from the hearing is problematic not only because of the difficulty in refuting the ISA information, but also by its contribution to the development of a unique courtroom dynamic. Both state attorneys and ISA representatives expressed their feelings that the unique atmosphere and dynamics of the *ex parte* proceedings created a trust-based relationship between the Justices and the state representatives. As explained by State Attorney C: ‘The *ex parte* proceedings create intimacy between the state representatives and the Justices’.<sup>143</sup>

State Attorney A described this as a ‘secret dialogue’ between the state attorneys and the Supreme Court.<sup>144</sup> ISA Representative A added his impression that the closed doors and the repeated interaction created a ‘shared language’ between the ISA representatives, the state attorneys, and the Supreme Court Justices.<sup>145</sup> ‘After all’, he added, ‘we all know each other and work together’.<sup>146</sup>

## C. Judicial Management Model and De-Individualisation of Justice

As the case law analysis revealed, most of the written decisions concerning concrete detention orders were so brief as to ignore many of the individual circumstances and specific details of each case. In the interviews, both defence lawyers and former detainees expressed their frustration with this practice, which ignores the individual characteristics of the detainees and tends to neglect crucial details, such as the length of detention. As one defence lawyer stated: ‘There is no human being in the case: not where he is from, not how old he is, not even how long his detention is; nothing’.<sup>147</sup>

State Attorney A shared this perception of an alienating and de-individualised, process and opined that the entire process of security detentions, from the detention order, to the appeal, to the Military Court, to the petition to the High Court of Justice, is merely ‘a copy-paste from the beginning to the end’.<sup>148</sup> This description was affirmed by ISA Representative A, who characterised the process as an ‘assembly line’, and expressed discomfort with the effects of this process on ISA methods:

<sup>140</sup> Interview with State Attorney B (23 December 2010).

<sup>141</sup> Interview with State Attorney A (21 December 2010).

<sup>142</sup> Interview with State Attorney B (23 December 2010).

<sup>143</sup> Interview with State Attorney C (26 January 2011).

<sup>144</sup> Interview with State Attorney A (21 December 2010).

<sup>145</sup> Interview with ISA Legal Advisor A, Israeli Security Agency (14 February 2011).

<sup>146</sup> *ibid.*

<sup>147</sup> Interview with Defence Lawyer A (n 135 above).

<sup>148</sup> Interview with State Attorney A (n 144 above).

I am not fond of preventive detentions; not because of personal liberty aspects of it, but rather due to the impact of its mass use on the professionalism of the ISA. Instead of using a sharp scalpel – well, it harms the quality of our work.<sup>149</sup>

In the interview ISA Representative A further explained that the second Intifada, which began on October 2000, changed the organisation's methods of work: before the Intifada, the ISA had to collect intelligence information concerning a small number of Palestinians, mainly political leaders, and was therefore able to carefully collect the relevant information regarding each individual ('with tweezers'). The new security challenges presented by the popular uprising changed this situation and forced the ISA to start collecting intelligence information on hundreds of Palestinians.<sup>150</sup> Under these circumstances, the quality of the information concerning each individual had to be somewhat downgraded. In his words: 'This is, of course, a very convenient tool, but when you use it too much it becomes dull'.<sup>151</sup>

These assessments may shed light on why, in many of the cases, the detainees did not request their presence at their own hearings, and preferred to remain locked up in their prison cells rather than participate in the judicial review process.<sup>152</sup> Defence Lawyer B, who represented the detainee in one of the few cases that received a fully elaborated legal decision, did not feel any joy of success. On the contrary, she felt even more frustrated because she was unable to share this partial success with her client: 'my client was very much disappointed, since the decision wasn't at all about him'.<sup>153</sup>

In her opinion, both the cursory written decisions and the legally substantiated decisions are similar in the sense that they are never focused on the individual detainee: the former decisions are short and laconic, a cut-out template with no individual details or characteristics; the latter – those fewer, longer and legally substantiated decisions – too, are not focused on the individual detainee, but rather on the general legal framework:

The more reasoned judicial decisions are no more than a bunch of clichés, since they are not implemented . . . the Justices talk highly about being the 'detainee's mouth', but they can't. How can they be his mouth, when they know nothing at all about his side of the story?<sup>154</sup>

#### **D. Judicial Management Model, Transparency and Open Justice Principles**

The interviews revealed a more subtle weakness of this complicated and sensitive judicial process: namely, an ambiguity regarding the actual certainty, and feelings of the various stakeholders participating in this process. Although state representatives and Justices expressed confidence, decisiveness, and assertiveness during the courtroom hearing, doubts were raised in the interviews. There was lingering concern in a number of the interviews that despite doing 'the best they can', the judges were limited in their

<sup>149</sup> Interview with ISA Legal Advisor A (n 145 above).

<sup>150</sup> Interview with ISA Legal Advisor A (n 145 above).

<sup>151</sup> *ibid.*

<sup>152</sup> The database I created recorded 59 such requests, all MDO cases, which is about 30% of the MDO cases that reached the stage of a courtroom hearing.

<sup>153</sup> Interview with Defence Lawyer B (n 135 above).

<sup>154</sup> *ibid.*

ability to challenge the secret evidence, and filled with doubts.<sup>155</sup> Despite making incredible efforts, the Supreme Court Justices expressed discomfort with their role as the detainee's representative, and admitted that these are indeed very difficult cases to deal with. 'We try to add a criminal process aroma to the proceedings',<sup>156</sup> explained Justice B, acknowledging that it is merely an 'aroma'. State Attorney B described his own feelings regarding the dynamics surrounding the secret evidence regime, confessing that:

To the detainees, the Justices demonstrate a façade of effective review, while deep down they are not fully convinced. Even we, the state attorneys, do that: I always felt a stomach ache that was never transferred to the detainee's lawyer.<sup>157</sup>

### E. Judicial Management Model and Bargaining in the Shadow of the Court Dynamics

The research identified a significant rate of withdrawals: 36 per cent of the MDO cases were withdrawn by the petitioners (the detainees) shortly before the court hearing. Moreover, in 19 per cent of the MDO cases, the petitions were withdrawn after the Court had examined the secret evidence *ex parte*. The interviews shed some light on these findings, pointing out that, in fact, many of the MDO petitions are submitted not to initiate a judicial review process, but rather to instigate some sort of negotiation with the state's representatives and prompt a settlement. Apparently, as is evident from the state attorney and ISA interviews, the submission of a petition to the High Court of Justice initiates an internal state process, in which the ISA reassesses the necessity of the detention.<sup>158</sup> If, at the end of this process, the ISA insists on the necessity of the detention, a specific state attorney is assigned to examine the strength of the case, and in some cases pressures the ISA to reach a settlement.<sup>159</sup> The relevant attorneys – both state attorneys and defence lawyers – described this process of 'bargaining in the shadow of the Court',<sup>160</sup> and explained the 'behind the scenes' impact of the Court on the state's position.<sup>161</sup> The interviews showed that, this 'bargaining' process is pursued by detainees' lawyers not only to reach a beneficial settlement, but also to acquire some information regarding the strength and nature of the secret evidence.<sup>162</sup> The high withdrawal rate – 36 per cent of the MDO cases – is therefore explained either by: a settlement ending the detention (usually not immediately, but within a couple of months); or an 'understanding' on detainees' part that the secret evidence against them is strong and that it is therefore ill advised, and potentially harmful, to continue with the judicial review process and present the secret evidence to the Court.<sup>163</sup>

<sup>155</sup> Interview with Justice A (n 128 above); Interview with Justice B, Supreme Court of Israel (21 December 2010); Interview with Justice C, Supreme Court of Israel (20 December 2010); Interview with Justice D (n 131 above).

<sup>156</sup> Interview with Justice B, *ibid.*

<sup>157</sup> Interview with State Attorney B (n 142 above).

<sup>158</sup> Interview with ISA Legal Advisor A, Israeli Security Agency (14 February 2011); Interview with State Attorney A (n 144 above).

<sup>159</sup> Interview with State Attorney A, *ibid.*

<sup>160</sup> A phrase coined by Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale LJ* 950.

<sup>161</sup> Interview with Defence Lawyer A (n 135 above); Interview with Defence Lawyer B (n 135 above); Interview with Defence Lawyer C (22 December 2010); Interview with State Attorney A (n 144 above); Interview with State Attorney B (n 142 above); Interview with State Attorney C (26 January 2011).

<sup>162</sup> Interview with Defence Lawyer B (n 135 above).

<sup>163</sup> *ibid.*

Without ignoring the advantages – namely the state’s internal re-inspection that sometimes leads to ending the detention – there are some inherent deficiencies with this practice. First, there is a meaningful and structural imbalance between the state and the detainee. The detainee and his or her lawyer come to the negotiating table not knowing the quality, reliability and quantity of the information held by the state, and may therefore be pressured to agree to poor settlements. Secondly, the Court is unaware of the majority of these negotiated settlements. It does not scrutinise them, and therefore cannot regulate the detention system. Moreover, it is precisely in these cases – in which the ISA prefers not to go to court – that judicial review would be the most necessary and useful. According to the ISA interviews, the ISA typically agrees to settle where they assess the evidence is not strong enough, or does not comply with the Court’s legal instructions, and therefore (in their legal opinion) there are chances that the Court will decide to intervene.<sup>164</sup>

This dynamic is not restricted to the pre-hearing stage of the process. In many MDO cases the Court acted as a mediator in this bargaining process, suggesting to both the detainee and the state various alternatives to the continuation of the detention (including deportation).<sup>165</sup> In 13 per cent of the MDO cases the Court offered specific recommendations for the state, including recommending that the state not issue a prolonged detention order or that a senior ISA officer be involved in such a decision. While the state does not automatically implement such recommendations, the Supreme Court’s statements can potentially influence the Military Courts’ judicial review. Accordingly, ISA Representative A emphasised the restraining effect of the Court, and the desire of the ISA to avoid ‘bad decisions’.<sup>166</sup>

Many of the interviewees emphasised the effective shift of judicial review from the main stage, the courtroom, to the behind-the-scenes actions: internal state proceedings and negotiations with the defence lawyers, either before or after the court hearing. In this context, State Attorney B emphasised the shift of the review from the Court to the state authorities, and expressed discomfort with having to play this dual role: ‘a part of the judicial review is transferred from the Court to the state attorneys, and since they represent the ISA – they are under conflict of interests’.<sup>167</sup>

State Attorney C added his own impression, explaining that this duality does not produce robust state scrutiny of the necessity of the detention:

The state attorney’s power should not be overstated or idealised. We represent the ISA even in borderline cases, especially when we are dealing with masses of cases, and the idea that we are conducting a meaningful review is not more than a myth.<sup>168</sup>

ISA representatives affirmed this assertion, stating that the ISA conducts an independent assessment when a petition is submitted to the Supreme Court, and offers a settlement only if it coincides with its own agenda.<sup>169</sup>

In short, although the bargaining process may sometimes lead to releases of detainees, it is not necessarily desirable due to several weaknesses: *the inherent imbalance of the*

<sup>164</sup> Interview with ISA Legal Advisor A (n 145 above).

<sup>165</sup> See, eg, HCJ 8142/10 *Ayad Dudin v Military Commander in the West Bank* (2010) (unpublished decision) (Israel); HCJ 9456/05 *Tsubach v Military Judge* (2005) (unpublished decision) (Israel).

<sup>166</sup> Interview with ISA Legal Advisor A (n 145 above).

<sup>167</sup> Interview with State Attorney B (n 142 above).

<sup>168</sup> Interview with State Attorney C (n 161 above).

<sup>169</sup> Interview with ISA Legal Advisor A (n 145 above).

*process; the blindness of the detainee regarding the secret evidence and its strength; and the finding that, indeed, in many of the cases, the settlement represents ISA interests alone.*

### VIII. JUDICIAL MANAGEMENT VS SPECIAL ADVOCATES

Interestingly, almost all of the relevant stakeholders interviewed that participate in the proceedings – including the Justices themselves – agreed that the judicial management model suffers from inherent weaknesses that potentially prevents, at least in some of the cases, meaningful and independent judicial assessment of the secret evidence.

As previously discussed, a competing judicial review model for security detention cases is the ‘special advocate’ model: the appointment of special advocates, approved by the state to represent the detainees in these hearings.<sup>170</sup> In their contribution to this book, Cole and Vladeck compare and contrast three versions of the special advocate model – adopted in Canada, the United Kingdom and the United States. Their conclusion is that none of these models sufficiently guarantees individual liberty in the face of competing security interests. The interviews with Israeli Justices and lawyers reveal similar difficulties balancing security and liberty in the face of secret evidence and the security crisis. As Justice B observed in interview: ‘It is not pleasant. You want to run away from it as fast as you can, but you know that it is necessary for the sake of your people and homeland’.

In many of the interviews the Justices explained the difficulty of challenging the secret evidence, and therefore some of them expressed enthusiastic support for the adoption of a special advocate model in Israel. In the interviews, each of the Justices individually explained that using a special advocate – although not an ideal solution – would help reduce the one-sided nature of *ex parte* proceedings.<sup>171</sup> None of the Justices thought the functioning of his or her active role as ‘the detainee’s lawyer’ satisfactory; whilst being aware of the shortcomings of special advocates, they felt that adopting such a system could only improve the current situation.<sup>172</sup> Justice D put the point succinctly: ‘[A special advocate] is better than nothing. Now we have nothing’.<sup>173</sup>

This is very different from the formal approach the Court often expresses in its judgments, as was elaborated in Section IV. Formally, the Court’s decisions demonstrate confidence, and pride even, in the Court’s ability to play the role of the detainee’s lawyer during the *ex parte* proceedings, and to be his or her ‘mouth’. The Justices’ personal perceptions and scepticism reflect a similar approach to the one expressed by some of

<sup>170</sup> While this research does not pretend to provide any systematic assessment of the advantages and disadvantages of the special advocate model, the opinions of the stakeholders – mainly, the Justices – on the use of it, will be used here to shed more light on the judicial management model, rather than assessing this model independently. For elaborated analysis of the ‘special advocates’ model, see generally Kent Roach, ‘The Three Year Review of Canada’s Anti-Terrorism Act: The Need for Greater Restraint and Fairness, Non-Discrimination, and Special Advocates’ (2005) 54 *University of New Brunswick Law Journal* 308.

<sup>171</sup> Interview with Justice A, Supreme Court (n 128 above); Interview with Justice B, Supreme Court (n 155 above); Interview with Justice C, Supreme Court of Israel (20 December 2010); Interview with Justice D, Supreme Court (n 131 above).

<sup>172</sup> Interview with Justice A, Supreme Court (n 128 above); Interview with Justice B, Supreme Court (n 155 above); Interview with Justice C, Supreme Court (n 171 above); Interview with Justice D, Supreme Court (n 131 above).

<sup>173</sup> Interview with Justice D, Supreme Court (n 131 above).

their Canadian counterparts. Thus, in the *Charkaoui* case<sup>174</sup> (discussed more deeply in the introduction (chapter six) as well as in the two other chapters in this Part), the Canadian Supreme Court ordered the adoption of a special advocate model in Canada. The Canadian Supreme Court refused to embrace this role (of being the detainee's lawyer) and expressed concern for its potential effects on the Court's independence and impartiality. As was stated by McLachlin CJ:

Three related concerns arise with respect to independence and impartiality. First is the concern that the IRPA may be perceived to deprive the judge of his or her independent judicial role and co-opt the judge as an agent of the executive branch of government. Second is the concern that the designated judge functions as an investigative officer rather than a judge. Third is the concern that the judge, whose role includes compensating for the fact that the named person may not have access to material and may not be present at the hearing, will become associated with this person's case.

But while justices in both Israel and Canada expressed support for the special advocate model, the lawyers participating in these proceedings were less enthusiastic. In the interviews, both state attorneys and defence lawyers assessed that having a special advocate is not likely to change the outcome of the cases, but only make the process 'look better'.<sup>175</sup> As stated by Defence Lawyer C: I'm against the use of special advocates. We don't need to make this process look better – we need to reduce its use.<sup>176</sup>

Defence Lawyer D agreed that as to mass security detentions, the special advocate model does not have the potential to improve the fairness of the ex parte hearings:

Special advocates can only help in a very minimal detention regime, when only a few people are detained. When there is a massive use of administrative detentions no one will be able to deeply investigate the evidence and the allegations.<sup>177</sup>

The opinions expressed by the Israeli lawyers who participate in the proceedings described as the judicial management model are almost identical to the opinions expressed by their colleagues in the United Kingdom, who participate in the special advocate model proceedings there. The UK barristers working as special advocates in the UK system recently gave important statements to an inquiry of the Parliamentary Joint Committee on Human Rights. That Committee summarised the special advocates' evidence thus:

After listening to the evidence of the Special Advocates, we found it hard not to reach for well worn descriptions of it as 'Kafkaesque' or like the Star Chamber. The Special Advocates agreed when it was put to them that, in the light of the concerns they had raised, 'the public should be left in absolutely no doubt that what is happening . . . has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.' Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against the basic notions of fair play as the lay public would understand them.<sup>178</sup>

Listening to the voices of those participating in hearings which are dominated by secret evidence is troubling. Judges and lawyers alike are painfully aware of their limitations in

<sup>174</sup> *Charkaoui v Canada* (No 1) [2007] 1 SCR 350.

<sup>175</sup> Interview with State Attorney C (n 161 above).

<sup>176</sup> Interview with Defence Lawyer C (n 134 above).

<sup>177</sup> Interview with Defence Lawyer D (23 December 2010).

<sup>178</sup> *Al Rawi v The Security Service* [2011] UKSC 34, 37.

challenging the secret evidence and promoting both truth and justice. In essence, these voices and views undermine the debate over the details of the specific judicial review model, and bring back to life the basic question concerning the legality, morality and wisdom of this dubious mechanism altogether.

## IX. CONCLUSION

The combination of security crisis, secret evidence and preventive detentions poses unique challenges to effective judicial review. In Israel, a quasi-inquisitorial judicial management model has emerged to confront these challenges and ostensibly to provide strong guarantees against arbitrary and unjustified detentions. The analysis of the reasoning of the Supreme Court in many of its decisions demonstrates the Court's ability (and willingness) to craft legal limitations and instructions concerning security detentions. Nonetheless, the empirical evidence presented and discussed above sheds some light on the actual practice of the Court and cast doubt on the effectiveness of review with regard to the individual detainees. As was revealed, the Court systematically avoids issuing release orders and the secret evidence almost always outweighs all other considerations. As both the case-law analysis and the interviews demonstrate, the Court refrains from openly rejecting the ISA assessment of the secret evidence, and prefers either to focus on general legal instructions or to be satisfied with non-binding 'recommendations'.

The findings summarised here should prompt doubt about the advantages of the judicial management model, which scholars argue reveals the 'actual truth' and regulates the detention system. *First*, the interviews suggest that the Supreme Court's ability to regulate the detention system is much more meaningful with regard to the legal interpretation of the statutory regime, than the assessment of the secret evidence and the individual circumstances of the case. The findings demonstrate that, indeed, the Court's main impact in these cases is through crafting legal limitations by narrowly interpreting statutory language, and not by analysing the credibility and strength of secret evidence itself. Moreover, as revealed by this research, most of the borderline cases are withdrawn before they reach a courtroom. The outcomes of these cases are the result of settlements between the detainee and the state, not meaningful judicial review. Therefore, the Court's regulatory capacity is limited because the cases that could have potentially instigated such a regulatory intervention are left undecided. *Secondly*, regarding inquisitorial fact-finding, this research identified a 'bargaining phenomenon', where parties resolve individual detention cases through alternative dispute resolution mechanisms, such as mediation and negotiation. These mechanisms do not focus on rigorous fact-finding or verification of the justifications for detention, and, instead promote practical solutions in the immediate interest of the parties.

*Finally*, the massive use of security detentions causes de-individuation of the detention process. In the assembly line of security detentions individuals are constantly stripped of their unique personal characteristics, and court dockets become templates of security considerations. Secret evidence, and specifically the security authorities' interpretation of it, dominates the judicial review process, and repeatedly outweighs individual liberty and procedural transparency and fairness. In a detention system in which judicial review makes very little impact on individual detainees, alternative protests such as hunger strikes are more likely to signal their pursuit of selfhood and identity.



## Part 4

# Religion and Human Rights



# *The Intersection of Religious Autonomy and Religious Symbols: Setting the Stage*

CHRISTOPHER MCCRUDDEN AND BRETT G SCHARFFS

## I. INTRODUCTION

TWO SETS OF issues in the area of law and religion have generated a large share of attention and controversy across a wide number of countries and jurisdictions in recent years. The first set of issues relates to the autonomy of churches and other religiously affiliated entities such as schools and social service organisations in their hiring and personnel decisions, involving the question of how far, if at all, such entities should be free from the influence and oversight of the state. The second set of issues involves the presence of religious symbols in the public sphere, such as in state schools or on public lands, involving the question of how far the state should be free from the influence of religion.

Although these issues – freedom of religion from the state, and freedom of the state from religion – could be viewed as opposite sides of the same coin, they are almost always treated as separate lines of inquiry, and the implications of each for the other have not been the subject of much scrutiny. In this Part, scholars with a variety of perspectives and from a range of countries and legal systems engage with the same set of cases from different jurisdictions involving these two sets of issues in order to consider whether insights might be drawn from thinking about these issues both from a comparative law perspective and also from considering these two lines of cases together.

## II. INTRODUCING THE CASES

### A. Church Autonomy: Freedom of Religion from the State

Several cases relating to church autonomy have been decided recently in a variety of jurisdictions. These cases often arise from controversies about personnel issues, usually involving the dismissal of an employee for falling short of the religious organisation's expectations of how the employee should behave. In its starkest form, the question posed is whether religiously affiliated employers are legally permitted to discriminate on the basis of religion in their employment decisions. The cases often involve decisions along two intersecting axes, one involving the nature of the job and the other involving

the nature of the institution. When the job involves the position of a priest, minister, or someone responsible for teaching Church doctrine, churches are usually afforded considerable leeway in how to treat that individual. (In the United States, this has been termed the ‘ministerial exception’ problem.) But the imposition of religiously motivated standards on an individual employee becomes more controversial as the nature of the work is seen as moving further away from core ecclesiastical functions; religiously affiliated organisations are accorded less freedom in regards to those teaching secular subjects, providing staff support, and providing services that do not have an obvious religious component, such as providing cleaning services. Similarly, when the institution is the Church itself, a greater degree of autonomy is usually granted, with less protection given to religiously affiliated operations such as schools, hospitals, and social service providers that are seen as engaged in activities further removed from the core activities of the Church. It is also sometimes thought to be important whether public funding is involved, with ordinary secular non-discrimination criteria more readily applied when the state is involved in funding the institution or activity.

In order to consider these issues comparatively, our contributors focus on several cases decided by the European Court of Human Rights (ECtHR), and courts in the United Kingdom, South Africa, and the United States. In these cases, we see the courts struggle with a deep conflict between rights based on equality on the one hand (non-discrimination), and rights based on freedom of religion on the other (church autonomy). In a sense, these cases invoke the age-old struggle between freedom and equality to become the dominant political and legal value of particular societies.

Two of the ECtHR cases, *Obst v Germany*<sup>1</sup> and *Schüth v Germany*,<sup>2</sup> involved similar factual scenarios, but in decisions handed down on the same day in 2010 the Court appeared to reach opposite conclusions. The *Obst* case involved the dismissal by The Church of Jesus Christ of Latter-day Saints (often called the Mormons) of its Director of Public Relations for Europe on grounds of adultery. In the *Schüth* case, parish-level Roman Catholic authorities dismissed the church organist, also because of an adulterous relationship. The Court held that the dismissal of Schüth, the organist, was a violation of Article 8 of the European Convention on Human Rights (ECHR) (the right to protection of private and family life) but that the dismissal of Obst, the Director of Public Relations, was not. The Court focused on the character of the balancing of protection of the interests of the organisation and protection of the interests of the individuals performed by the German courts, and the cases included considerable analysis of the legitimacy of the respective churches’ grounds for dismissal. In the third case, *Siebenhaar v Germany*,<sup>3</sup> the Court held that the dismissal of a childcare assistant in a day-nursery run by a Protestant parish in Pforzheim, after the teacher converted from Roman Catholicism to the Church Universal/Brotherhood of Mankind, did not violate the teacher’s Article 9 (protection of thought, conscience and religion) rights read in the light of Article 11 (protection of assembly and association).

These ECtHR cases are considered together with cases from the United Kingdom, South Africa, and the United States. In *Moore v President of the Methodist Conference*,<sup>4</sup> the English Court of Appeal held that a lower court had erred in dismissing litigation

<sup>1</sup> *Obst v Germany* (App no 425/03), 23 September 2010 (ECtHR).

<sup>2</sup> *Schüth v Germany* (App no 1620/03) (2011) 52 EHRR 32 (ECtHR).

<sup>3</sup> *Siebenhaar v Germany* (App no 18136/02), 3 February 2011 (ECtHR).

<sup>4</sup> *Moore v President of the Methodist Conference* [2012] QB 735 (United Kingdom).

brought by a Methodist minister who had complained of unfair dismissal. The employment tribunal that first heard the case had held the minister was not an ‘employee’ under UK employment law, but the appeal court held that this was not necessarily the case and that despite the religious and spiritual nature of their services, a contractual arrangement could arise between a minister of religion and the Church. In *Strydom v Moreleta Park Congregation of Dutch Reformed Church*,<sup>5</sup> a case from South Africa involving a church organist dismissed for engaging in homosexual conduct, the plaintiff won compensation of 75,000 Rands for pain and suffering and 11,000 Rands for loss of income on the grounds that he was a victim of ‘unfair discrimination’ under the Promotion of Equality and Prevention of Unfair Discrimination Act.

The existence of a ministerial exception from employment non-discrimination laws was also the issue in *Hosanna-Tabor Evangelical Lutheran Church and School v EEOC*,<sup>6</sup> decided by the Supreme Court of the United States in 2012. The case (a disability discrimination case) involved an employee of a small church-sponsored school who was a ‘called minister’, but whose responsibilities were the same as other employees who were not ‘called ministers’. The lower court held that the ministerial exception did not apply in the case, invoking a novel test focusing on the amount of time that the teacher spent in religious activities (which was quite small – leading daily prayer and worship; teaching religion classes; and taking her turn leading school devotions; most of her time was spent teaching mathematics). In a unanimous opinion, the Supreme Court reversed this decision, holding that the employee did not enjoy the protection of the Americans with Disabilities Act because the school was protected by the ministerial exception. The Court held that determining who is and is not a minister is not, in principle, an activity that a stopwatch can answer.

## B. Religious Symbols: Freedom of the State from Religion

The second set of cases considered by the contributors in this Part involves the permissibility of religious symbols in public spaces. Again several cases from the European Court of Human Rights are considered together with companion cases from the United Kingdom, South Africa, and the United States. These cases involving religious expression in the public sphere sometimes implicate the rights of individuals to express their religious beliefs in secular settings and sometimes involve the right of the state to permit or require religious expression in public settings.

This issue has moved to the forefront of European consciousness with the case of *Lautsi v Italy*,<sup>7</sup> where the Grand Chamber of the ECtHR reversed an earlier Chamber decision, and held that the mandatory display of crucifixes in the classrooms of Italian state schools was within the margin of appreciation accorded to Member States of the Council of Europe and did not violate Article 2 of Protocol No 1 of the ECHR (right of parents to have their children educated in accordance with their religious and other views). It was not therefore necessary to examine separately the complaints under Article 9 (relating to

<sup>5</sup> *Strydom v Moreleta Park Congregation of Dutch Reformed Church* [2009] 4 SA 510 (Equality Court, TPD) (South Africa).

<sup>6</sup> *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*, 132 S Ct 694 (2012) (United States).

<sup>7</sup> *Lautsi v Italy* (GC) (App no 30814/06), 18 March 2011 (2012) 54 EHRR 3 (ECtHR).

thought, conscience and religion) or Article 14 (relating to non-discrimination). This case was particularly controversial in light of previous cases where the European Court upheld state restrictions on the religious expression of Muslims. For example, in *Leyla Şahin v Turkey*,<sup>8</sup> the Court upheld the University of Istanbul's restrictions on the wearing of Islamic headscarves and said the measures taken to implement them had not breached the applicant's rights under Article 9, on the grounds that the prohibition was justified in principle and proportionate to the aims pursued and, therefore, could be regarded as 'necessary in a democratic society'.

In the United Kingdom case of *Chaplin v Royal Devon & Exeter Hospital NHS Foundation Trust*,<sup>9</sup> a nurse refused on religious grounds to stop wearing a crucifix with her uniform, contrary to the Hospital Trust's health and safety policy. As a consequence, she was redeployed as an Admissions and Discharge Coordinator (in which post she was not subject to the same restrictions). An employment tribunal held that she had not been subjected to direct or indirect discrimination in violation of the provisions of the Employment Equality (Religion or Belief) Regulations of 2003.<sup>10</sup> In a South African case, *Pillay v MEC for Education KwaZulu-Natal and Others*,<sup>11</sup> the South African Constitutional Court held that school officials who refused to make an exception from a dress code prohibiting jewellery, violated the constitutional equality rights of a teenaged Hindu girl, Sunali Pillay, who wore a nose stud in keeping with Hindu custom.

In the United States, cases involving religious symbols on public property have been controversial and have resulted in closely divided outcomes. In two cases decided by the Supreme Court on the same day in 2005, the Court upheld the display of a monument on which the Ten Commandments of God were inscribed situated in the grounds of the Texas State capitol,<sup>12</sup> while holding unconstitutional a display of the Ten Commandments in a Kentucky courthouse that was part of a set of documents commemorating the foun-

<sup>8</sup> *Leyla Şahin v Turkey* (GC) (App no 44774/98), 10 November 2005 (2007) 44 EHRR 5; 19 BHRC 590; [2006] ELR 73 (ECtHR). But see *Ahmet Arslan v Turkey* (App no 41135/98), 23 February 2010 (ECtHR) [judgment in French only] (reversing the conviction of members of a Muslim religious group for wearing their distinctive religious headgear and dress in public other than for religious ceremonies on grounds that this restriction had not pursued the legitimate aim of protecting public safety and preventing disorder and had therefore violated Article 9 of the ECHR (freedom of thought, conscience, religion)).

<sup>9</sup> *Chaplin v Royal Devon & Exeter Hospital NHS Foundation Trust* [2010] ET 1702886/2009 (United Kingdom). See also *Eweida v British Airways PLC* [2010] EWCA Civ 80 (United Kingdom).

<sup>10</sup> Chaplin's application to the ECtHR alleging that her treatment was contrary to Article 9 ECHR was also unsuccessful, *Eweida and Others v United Kingdom* (App nos 48420/10, 36516/10, 51671/10, and 59842/10), 15 January 2013, [2013] ECHR 37 (ECtHR), on the grounds that health and safety concerns – including the risk that a patient might pull the chain necklace, injuring Ms Chaplin or the patient – justified the limitation on Chaplin's manifestation of religion. In companion cases, the European Court held: that British Airways' policy (which had already been modified) not allowing an employee, Ms Eweida, to wear a small crucifix necklace, violated her Article 9 rights; that the dismissal of a marriage registrar employed by local government, Ms Ladele, for refusing to act as a registrar for same-sex civil partnerships was within the state's margin of appreciation and did not violate Article 14 read with Article 9; and that the dismissal of a relationships counsellor, Mr McFarlane, for not agreeing to provide psycho-sexual counselling to same sex couples, did not violate Article 9. Chaplin, McFarlane, and Ladele have requested that their cases be heard by the Grand Chamber of the ECtHR.

<sup>11</sup> *MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007) (South Africa).

<sup>12</sup> *McCreary County v American Civil Liberties Union of Kentucky*, 45 US 844 (2005) (United States) (noting that the set of documents in two modified displays were all documents that had references to Christianity as the sole common element).

dations of American law.<sup>13</sup> The decisive vote in the cases was that of Justice Stephen Breyer, who focused on the purpose of the displays, as reflected in their history and context. In a more recent case, *Trunk v City of San Diego*,<sup>14</sup> the Ninth Circuit Court of Appeals held that a 43-foot tall cross, erected as a war memorial on federally owned public land atop Mount Soledad in San Diego, was an unconstitutional violation of the prohibition of the establishment of religion in the First Amendment of the US Constitution. The Ninth Circuit Court of Appeals disagreed with a lower court's conclusion that the memorial was 'primarily non-sectarian' and concluded that the monument was unconstitutional because it favoured one religion over another and 'primarily conveys a message of government endorsement of religion'.

### III. FRAMING THE ISSUES

As is so often the case, how we frame the issues makes a considerable difference in our analysis of them. Consider two ways of framing the proper relationship between religion and the state: one from a characteristically American point of view and the other from one that is more European.

#### A. Separation and Accommodation

In the United States, thinking about these issues seems to cluster around two competing approaches, one involving separation of religion and the state (which traces its lineage back to Thomas Jefferson's metaphor of 'a wall of separation between Church and State'), and the other permitting a greater degree of accommodation of religion by the state. In the first approach, the issue is often how high or impregnable the wall should be, rather than whether there should be a wall at all. The idea behind separation is simple enough. Shifting metaphors, if we appeal to the jurisdictional metaphor of spheres of autonomy or sovereignty, the separationist approach imagines two spheres, one representing the state and the other representing religion, although this simple picture is quickly rendered more complex when the reality of many religious orbs, rather than one, is recognised.

In the second approach, the motivating idea is that the goal of separation is itself misguided; that religion and the state do not represent opposing parties who must maintain a wall to keep boundaries clear. It rejects the dictum that 'good walls make good neighbours'. Rather, the accommodationist approach posits that there is and should be an element of co-existence and co-influence, even co-maintenance, between religion (or some religions) and the state. This approach may warm into an attitude of co-operation, although in an era of increasing religious diversity, which religions to include within this welcoming web of mutual assistance is likely to become controversial. And the risk of

<sup>13</sup> *Van Orden v Perry*, 545 US 677 (2005) (United States).

<sup>14</sup> *Trunk v City of San Diego*, 660 F 3d 1091 (United States). The case was appealed to the US Supreme Court, which denied certiorari on 25 June 2012, which means the Ninth Circuit holding stands. The dispute will likely return to the federal district court to address the constitutionality of a plan to transfer the site to private ownership.



co-operation between church and state, leading to one being co-opted by the other, is a recurring problem.

What difference does it make which approach is adopted? Consider the questions of religious autonomy and religious symbols sketched out earlier: if the goal is separation, then the answer to both sets of questions seems relatively straight forward. Separation would require a high degree of religious autonomy (ie, the state would stay out of all questions involving personnel and doctrine), and separation would also provide for a high degree of state autonomy (ie, religious symbols and influences would stay out of the state sphere). It is important to note, of course, that both state and religion might exist within a broader sphere of society and that it would be a mistake simply to equate the state sphere with the public sphere. Accommodation, on the other hand, would seem to provide for greater state involvement in religious affairs (for example, forbidding religiously affiliated schools and hospitals from discriminating in their hiring of employees or provision of services; after all, religion might be expected to accommodate the state, as well as vice versa), and accommodation would also provide for a greater degree of tolerance for religion in public life, including religious symbols in state-sponsored institutions such as schools.

But what is interesting – in the United States, at least – is that the political, and to some extent legal, alignments are almost exactly the opposite of what this picture would suggest. Those who want religious symbols out of state institutions and places are usually in favour of applying anti-discrimination laws to religious institutions. In other words they favour state autonomy from religion but not religious autonomy from the state. Separation cuts one way but not the other. And something similar is true with respect to religious symbols. Those who want religious symbols in state institutions are usually in favour of granting exemptions to religious institutions from the reach of state regulation. In other words, they favour religious autonomy from the state but not state autonomy from religion. Accommodation cuts one way but not the other. Thus, both sides find themselves in the apparently intellectually tenuous position of favouring autonomy or separation – but seemingly only when it suits their broader political goals.

There is, however, further conceptual work to do on this debate. We have styled these cases as involving the ‘autonomy’ of religions and the ‘autonomy’ of the state, but we have been purposefully vague about what is meant by autonomy. Elsewhere one of us has written about three different conceptualisations of the concept of autonomy that might serve as guiding ideals in religion–state relations – stark independence, inter-dependence, and inter-independence.<sup>15</sup> There are good reasons to be suspicious of notions of autonomy that rest upon stark independence, those that incorporate an idea of autonomy that involves separate spheres of being and activity, where the goal is for each institution not to touch or interfere with the other.<sup>16</sup> Inter-dependence may also be problematic because it involves such a high degree of mutual reliance that the capacity for self-direction and independence is placed in jeopardy.<sup>17</sup>

Rather, a more attractive concept may be the ideal of ‘inter-independence’. (Note, not ‘inter-dependence’ but ‘inter-independence’.) In this conception of autonomy, interactions are encouraged, especially when they are mutually supportive. Each institution

<sup>15</sup> BG Scharffs, ‘The Autonomy of Church and State’ (2004) *Brigham Young University Law Review* 1217–348.

<sup>16</sup> *Ibid*, 1248–51.

<sup>17</sup> *Ibid*, 1251–53.

can help the other exercise meaningful autonomy and self-direction.<sup>18</sup> From this perspective, for example, civic religion (religion manifested in the public space) is not viewed as threatening to the state; rather, it can be complimentary, even supportive. In the US context, inaugural prayers, declarations like ‘God Save This Honorable Court’, legislative prayers, the national motto, ‘In God We Trust’, the words ‘Under God’ in the Pledge of Allegiance do not threaten state autonomy; there is little or no risk that religion is exerting too strong an influence upon the state. On the other hand, tax limitations place rather stringent limitations on the political activities of churches. For example, religious groups cannot endorse political candidates. This, Scharffs believes, should be understood as part of a broader effort to preserve the independence of the state. Of course we will always have problems drawing lines and defining boundaries; inter-independence would focus on whether the involvement of the intervening institution creates a meaningful constraint upon the ability of the receiving institution to exercise its autonomy.

## B. Neutrality and Pluralism

Thus far, we have drawn on three commonly used concepts in the law and religion context: autonomy, accommodation, and separation. Does the picture change if we change our conceptual frame? Rather than thinking in terms of separation and accommodation, we can think of these issues, perhaps in a more European way, from the perspective of the debate between those espousing neutrality and those adopting pluralism as their goal.

Consider two different regimes, both of whose constitutions require them to protect freedom of religion. One we will call *Pluriana*; the other, *Neutrality*. *Pluriana*, true to its name, adopts pluralism as its preferred constitutional goal, embracing toleration as a substantive value of high importance. This position is justified on the view that allowing religion into the public space *or* stripping the public space of religion involves taking sides for or against religion and that there is therefore no ‘neutral’ position for the state to adopt. The constitution allows religion into the public domain and even allows public authorities to adopt a religious (even sectarian) perspective on issues of public policy. But that is merely permitted, not required; equally, public authorities may decide to adopt the opposite position: to disallow the adoption of religious attachments by the state. Either approach is permissible as the initial starting point; it is a matter for democratic politics which preferences to adopt.

There are two limits to the democratic choices that apply in *Pluriana*. First, whatever initial stance the public authorities adopt (whether to adopt a religious, or a sectarian, or a secular position), the state must attempt to help keep the balance, as it were, by taking active measures to ensure pluralism and tolerance for the other view, the one not explicitly adopted by the state. The second condition is that ‘intolerant’ religions are not permitted to exercise their intolerant beliefs, even in their own spheres of activity. Taken to an extreme, of course, this limit might result in the state simply banning religions that it disagreed with, and so there must be limits on the limits; only the most extreme expressions of intolerance would be preventable; we might think of a religion that believed in sexual abuse of children as religiously required as being so outside the pale as to be

<sup>18</sup> Ibid, 1253–58.

unacceptable in this extreme way. So, the result is greater freedom for religions to enter and secure a place in the public space (including the display of religious symbols) if democratically approved but greater constraints on intolerant activities, even when manifested in private, that is, in the context of church activities. In practice, this involves a high degree of negotiation and renegotiation between different interests.

*Neutrality*, true to its name, adopts neutrality as its constitutional position, and takes the view that the purpose of freedom of religion is essentially to protect private choices. The role of the state should be one of tolerance towards religion but non-engagement. It views a 'neutral' public space as one largely without displays of officially approved religious symbolism or acts. This restricts the ability of religions to enter and secure the public space (including restricting the display of religious symbols in the public space) even with democratic support, but the quid pro quo is that when religions operate in their private sphere they are largely allowed to be as intolerant as they like, and are accorded substantial autonomy and protection from public scrutiny. So, the result is more restrictions on public displays but fewer restrictions on private intolerance, and thus greater autonomy in the private sphere.

With due allowance for considerable oversimplification, we might think that *Pluriana* represents the legal regime under the European Convention on Human Rights and that *Neutrality* represents the dominant position under the United States Federal Constitution, at least as currently adopted by the European Court of Human Rights and the Supreme Court of the United States, respectively. Put another way, the more European-sounding analysis shows a strong resemblance to the more American-sounding distinction between separation and accommodation, with neutrality and separation having significant commonalities, and similarly with pluralism and accommodation. Taken together, the two sets of cases under consideration present a relatively stark choice of tradeoffs. Remember that these are *competing* conceptions of texts that each embrace the concept of freedom of religion.<sup>19</sup> Although the Courts do not have remarkably dissimilar texts to interpret, they do reach divergent results.

Our consideration of these cases is dual-faceted. On the one hand, it is a discussion about two sets of cases (one dealing with religious symbols and the public space, and the other dealing with the willingness of public authorities to scrutinise exclusion from institutions that are associated with particular religions). At the same time, these cases require us to reflect on the Courts involved in these cases from a broader perspective, considering their constitutional and institutional characteristics, and what a comparison between the two Courts can tell us about these characteristics. If we are particularly brave (or perhaps foolhardy) we might even consider whether there is anything that either Court can learn from the other.

We have commented on the popularity of the metaphor of sovereign spheres both in the context of contrasting accommodation/pluralism and separation/neutrality. But we may need somewhat sharper conceptual clarity if the metaphor is to be useful, an idea developed in more detail in Johan van der Vyver's chapter. It may be that it is better not to think of sovereign spheres exclusively as a jurisdictional metaphor; after all, the state is always going to retain a degree of jurisdiction over churches and religious activities. When churches or their leaders are involved in unlawful conduct, such as the sexual abuse of children or covering it up, there is no question that the state could exercise

<sup>19</sup> See Article 9 ECHR; US Constitution, Amendment I.

jurisdiction. Rather, the idea of sovereign spheres might also be addressed in terms of ‘zones of competence’. Sometimes – indeed usually – courts may just stay out of religious controversies for their own sake, as well as for the sake of religions.

This is one way of viewing what the Grand Chamber was doing in *Lautsi*, where the Court said that it was not going to be drawn into the business of conclusively determining the meaning of the crucifix in Italian classrooms.<sup>20</sup> *Hosanna-Tabor* may perhaps be read in much the same way. The Supreme Court in effect said that it is beyond its zone of competence to make bright-line rules about who is and who is not a minister. But the Court did not render the issue beyond its institutional authority or jurisdiction. Rather it said, quite modestly, that in this case there was enough evidence to conclude that the petitioner was a minister. There are, of course, counter-examples – the Mt Soledad Cross case, where the Ninth Circuit answers confidently what it thinks the cross means, even though it is contextualised as part of a war memorial that has existed peaceably for a half century. Another counter-example might be the European Court of Human Rights’ church employment cases – where the Court comes perilously close to making determinations about what really lies at the core of different religions – both how important the rules against adultery are, and how important the job is to the religious essence of the Church. To say, in effect, that *Schüth* was ‘just the organist’ ignores the centrality of music to the liturgy and the Mass. Similarly, if the Court were to say, *Obst* was ‘just the PR person’, this would discount the centrality of who acts as spokesperson (who gets to speak on behalf of a group).

### C. Secularism and Secularity

We have also drawn on the idea of the secular state in our earlier description but we have so far failed to analyse the concept. There is a critical distinction between two different conceptions of what a secular state should aspire to look like. One possibility is what we, among others, might call ‘secularity’, and the other is a more comprehensive substantive viewpoint, which we can term ‘secularism’.<sup>21</sup> Scharffs has explained this distinction in detail elsewhere,<sup>22</sup> but (in summary) ‘secularism’, means an ideological position that is committed to promoting a secular order. Secularism is itself a positive ideology that the state may be committed to promoting. It is an ideology that may manifest itself as opposition to religiously-based or religiously-motivated reasons by political actors; hostility to religion in public life and an insistence that religious manifestations, reasons, or even beliefs be relegated to an ever-shrinking sphere of private life; an aggressive proselytising atheism; or what has been called ‘secular fundamentalism’.

<sup>20</sup> The Court notes that it ‘considers that the crucifix is above all a religious symbol’, and notes that the domestic courts came to the same conclusion and that the Italian Government has not contested this. (App no 30814/06), 18 March 2011 (2012) 54 EHRR 3, para 66. The Court then adds, ‘The question whether the crucifix is charged with any other meaning beyond its religious symbolism is not decisive at this stage for the Court’s reasoning’ (ibid). The Court notes that the *Consiglio di Stato* and the Court of Cassation have differing views about the meaning of the crucifix and that the Constitutional Court of Italy has not given a ruling, and concludes: ‘It is not for the Court to take a position regarding a domestic debate among domestic courts’ (ibid, para 68).

<sup>21</sup> See BG Scharffs, ‘Four Views of the Citadel: The Consequential Distinction between Secularity and Secularism, Religion and Human Rights’ (2011) 6 *Religion and Human Rights* 109–26.

<sup>22</sup> ibid, 110–11.

By contrast, 'secularity' means an approach to religion–state relations that avoids identification of the state with any particular religion or ideology (including secularism itself) and endeavours to provide a framework capable of accommodating a broad range of religions and beliefs. Secularity is a more modest concept, committed to creating what might be called a broad realm of 'constitutional space' in which competing conceptions of the good (some religious, some not) may be worked out in theory and lived in practice by their proponents, adherents, and critics.

Those committed to secularity consider it to be preferable to secularism as a guide to the right relationship between religion and the state because we should be sceptical of utopian visions and distrust those who seek to compel the implementation of an all-embracing vision of the good or right. Secularism, in other words, should not become the state religion – explicitly or implicitly. The state should not attempt to promote a pristine secular order where the public realm is scrubbed clean of all religious residue. This is not only a dystopian vision of neutrality, which is often defined in terms of what is excluded rather than by what is included, it is not really 'neutrality' at all, at least in any satisfying sense of the term. The reason secularity is a more attractive ideal is because it is not an ideology, but rather a framework for pluralism. If it is a conception of the good, it is a thin one. It does not say there is no 'truth', but rather that it is not the state's job to identify and promote a particular comprehensive truth.

Just as neutrality is closely aligned with separation, and pluralism with accommodation, secularism and secularity also share close resemblances with the previous conceptual distinctions we have drawn: secularity with pluralism and accommodation; secularism with neutrality and separation. We suggest, therefore, that it may be useful to see the cases and the chapters that follow, as involving a contest between two broad models of how to organise the relationship between religion and state: secularity/pluralism/accommodation versus secularism/neutrality/separation. This is not to say that the concepts in each of the two models are the same as each other, but they do seem to share sufficient certain family resemblances to make it worth-while drawing them together.

#### IV. THE MODELS APPLIED AND TESTED

Are these models useful for understanding the cases described previously? The cases suggest that the secularity/pluralism/accommodation model looks quite similar to the European Convention and secularism/neutrality/separation looks quite similar to the United States Constitution, as interpreted in these cases. The critical term here is '*as interpreted in these cases*'. Neither of these models is adopted wholesale in either jurisdiction even at the present time: we should remember the ECtHR (Second Section) opinion in *Lautsi* (which feels distinctly American), and the plurality in *Van Orden*<sup>23</sup> (which feels distinctly European). Nor should we regard either of these models as set in stone in the respective jurisdiction. The position in each jurisdiction discussed continues to evolve, and it is conceivable that the interpretation in each could move closer to the other. For example, the test of whether the European Court is willing to police a state

<sup>23</sup> *Van Orden v Perry* (n 13 above).

that prohibits religious symbols in the public space in the way that the Court policed a state that permits religious symbols in public spaces will be considered in forthcoming cases dealing with the Swiss constitutional prohibition on minarets, and the French and Belgian restrictions on the use of the *hijab* in any public places. Will the Court be willing to consider these bans to be disproportionate on the grounds that they manifest coercion against particular religions? More particularly, if these bans are not considered to be coercive but simply to have adopted a secularist point of view, how will the Court go about the task of testing whether the overall context of the ban manifests neutrality or hostility? What, in other words, is the social meaning of the restrictions, and to whom?

It is also easy to exaggerate the differences between these two broad models since they are both quite concerned with protecting religious freedom. The temptation to resort to models in doing comparative human rights is strong and can be useful as the beginning of an analysis, but such models are seldom other than useful heuristic devices that need to be deconstructed and problematised rather than reified. The two-models approach can be usefully complicated by introducing two additional models: *Religiosa*, which would adopt both a *Hosanna-Tabor* approach to Church autonomy, and a *Lautsi* approach to religious symbols (stripped of the requirement that dissenters be tolerated); and *Secularia*, which would severely restrict religious symbols as well as religious autonomy. Viewed in this wider context, both *Pluriana* and *Neutralia*, in their own ways, share a similar degree of tolerant forbearance toward religion.

## V. THE CONTRIBUTIONS

Carolyn Evans (in [chapter eleven](#)) contrasts four approaches that courts in a liberal legal system could adopt to address conflicts between religious employers who face claims of discrimination by employees who are not hired or who are fired based upon religious reasons. These approaches are *ordinary law*, *immunity*, *procedural fairness*, and *rights balancing* approaches. Evans discusses in turn the implications as well as the respective advantages and disadvantages of these four approaches. Ordinary law treats religious employers the same as secular employers. An immunity approach creates a sphere of non-interference where secular courts will not exercise jurisdiction with respect to religious employers. Procedural fairness is an approach that requires religious employers to offer employees a minimum set of procedural protections although it will not second guess substantive issues. The balancing approach seeks to weigh the rights of the religious employer against the rights of the employee.

Evans notes that in the employment context, while ‘there is no ready solution to the tension between the competing claims of religious autonomy and discrimination/labour law standards’, governments and courts ‘cannot walk away from their responsibilities to resolve these issues at either a policy level or in the application in a particular case’. Evans views the resolution of these issues as further complicated by two trends – the decline of religious belief in most Western democracies, and the increase in the social commitment to non-discrimination as reflected by the ‘relatively rapid transformation of homosexual relationships from ones that were prohibited by criminal law to ones that are protected against most forms of discrimination in most liberal democracies’. Reaching compromises in this area, Evans suggests, may be found in a ‘portfolio approach’ to the issues,

for example taking an immunity approach to ministerial positions, a rights balancing approach to other direct employees of a religion, and a general law approach to those who work for organisations such as schools or hospitals that are run by a religious organisation.

Alternatively, incentives (such as access to government funding) as opposed to prohibitions may be used to encourage religious employers to adhere to non-discrimination laws.

Johan D van der Vyver (in [chapter twelve](#)) also focuses on the internal affairs of religious institutions. He contrasts the approaches taken in cases involving employment policies and practices of religious institutions by courts in Europe, the United States and South Africa, and considers the implications of these decisions for the ‘power of religious institutions to regulate their internal affairs independently and without outside interference’. He focuses on this issue through the prism of ‘what contemporary Calvinistic political thought commonly refers to as the internal sphere sovereignty of religious institutions vis-à-vis the agencies of State authority’. Van der Vyver contrasts sphere sovereignty with Church autonomy, which he views as a delegation of power from a central institution to a local institution.

Sphere sovereignty, on the other hand, implies the relationship between two or more structurally distinct social entities, such as church and state. Here the internal sphere of competencies of the respective institutions is not dependent on a concession of the other but belongs to each one in its own right and is founded on its existence and functioning as an independent component of human society.

Van der Vyver views *Hosanna-Tabor*, as well as other US Church autonomy cases, as reflecting sphere sovereignty. The balancing approach taken by a German court in a case involving the dismissal of a doctor from a Catholic hospital for violating Church teaching regarding divorce, in contrast, contradicts the internal sphere sovereignty of churches, even though sphere sovereignty historically has been a basic principle of German constitutional law. Van der Vyver attributes the movement away from sphere sovereignty to the influence of recent decisions of the European Court of Human Rights in German cases (*Obst*, *Schüth*, *Siebenhaar*) involving the dismissal of church employees for conduct considered by their respective churches as violations of religious tenets, where domestic State courts were held to be required to strike a balance between the Article 9 religious freedom rights of the Church and the employee’s right to respect for private and family life as protected by Article 8 of the European Convention. Van der Vyver sees the South African approach as being closer to the US approach: ‘In both countries the internal sphere sovereignty of religious institutions relating to labour relations will only be upheld if the duties of the employee are somehow linked to the spiritual calling and/or doctrinal practices of the religious institutions’. He notes for example, that in the *Strydom* case, a music instructor who was dismissed from an arts academy of a congregation of the Dutch Reformed Church for being involved in a same-sex relationship recovered compensation for loss of income as well as pain and suffering. He observes, however, that there are some differences based upon the high priority given to equality in the hierarchy of social values protected by the South African Constitution and a reluctance of US courts to involve themselves in religious conflicts due to Establishment Clause concerns.

Paul Babie and James Kumrey-Quinn focus (in [chapter thirteen](#)) on how religious autonomy and religious symbols cases are addressed in Australia. Australia is an inter-



esting contrast to Europe, the United States, and South Africa because Australia is alone among Western liberal democracies in not having an entrenched bill or charter of rights. Thus, the protections for religious liberty are composed of a kind of patchwork quilt of federal, State, and Territorial provisions. The authors address the autonomy of religious schools with respect to employment practices, and note that rather than employing a ministerial exception, courts in Australia would evaluate 'the discriminatory act itself, compelling Australian courts to weigh evidence concerning the relevant Church doctrines and beliefs and the extent to which they are central to the job being undertaken or the beliefs of the Church's adherents'. Thus, in Australia, the outcome would depend upon the circumstances of each position. An Australian court would ask whether religious conformity was an 'inherent requirement' of the job, an enquiry that would focus on the level of religious responsibilities and leadership that characterised the job in question.

The question of religious symbols in public places would not be governed in Australia by a broad principle of separation of church and state. The seminal Australian establishment clause case, the DOGS (Defence of Government Schools) case,<sup>24</sup> held that government funding of private religious schools did not violate Section 116 of the Constitution, which prohibits an establishment of religion, and the authors believe that if a case like *Lautsi* were to arise in Australia, it would have a result similar to that of the Grand Chamber, allowing the religious displays. Babie and Kumrey-Quinn conclude that '[l]imited constitutional guarantees and a piecemeal legislative anti-discrimination regime in conjunction with a few common law principles render the protection of religious freedom in Australia complex and haphazard'. Control and responsibility for the relationship between religion and the state lies in the hands of the State and Territory legislatures.

## VI. CONCLUSION

The dilemma for comparative law is perennial: to capture and retain what is specific about each of the jurisdictions being compared, whilst at the same time to point to what is common and shared. Doing either to excess means that the comparison is unconvincing but getting the balance right is deeply problematic. We hope this introduction and the chapters that follow illustrate some of the problems in, as well as some of the potential advantages of, engaging in comparative human rights analysis in the context of issues of religion and law.

<sup>24</sup> *Attorney-General (Victoria); Ex rel Black v Commonwealth of Australia* (1981) 146 CLR 559.



## *Principles and Compromises: Religious Freedom in a Time of Transition*

CAROLYN EVANS

### I. INTRODUCTION

WE ARE IN a time of transition with respect to the legal, political, cultural and economic significance of religion in many established Western democracies. Countries which have been religiously relatively homogenous or which had long-established compromises between a small number of dominant groups (for example, Catholics and Protestants) are increasingly finding established ways eroding. The old verities are challenged and the new 'normal' has not yet had a chance to establish itself. Migration has played a real part in creating more religiously diverse societies, as has the greater ease with which both people and ideas travel across state boundaries. Many who might describe themselves as belonging to one of the mainstream religions are no longer as deeply connected to their religion in terms of participation in religious practices or agreement with their religion on all matters of faith or values as were previous generations. Some have adopted a spiritual position that deliberately dissociates itself from institutional religion. Possibly even more significantly, the number of people who reject religion all together (some with hostility and others with indifference or disinterested benevolence towards those who are religious) is growing in both absolute terms and as a percentage of the population in most Western states.

As is often the case during times of change, there can be increased tension as a series of matters that were once settled become disrupted and contested. Each side in many religious disputes sees itself as the victim – each claiming to be acting entirely in good faith while the other side is portrayed as venal or oppressive in its motivation. Nuance, complexity and sometimes even common sense can be lost in such debates, with what might appear to be relatively low-stakes issues in some senses taking on a symbolism that vests them with more importance than they might have had at other historical points.

The fluid nature of the current sets of relationships between religions and liberal states gives comparativism an important role both in terms of law and politics. Politically, of course, one side in a debate can attempt to use any improvements (as they perceive it) that are won in one country as a catalyst for changes in their own country. Their opponents can use the same changes elsewhere as a rallying cry to motivate political action to ensure that this does not happen. Courts, wishing to be seen as honest and 'legal' brokers, rather than

active political players in the cultural wars, can draw on judgments from other jurisdictions or the international/European realm to bolster the claim of outcomes in their cases to be driven by law. While American courts may have an aversion to this type of reasoning, it is commonplace elsewhere and has led to a blurring of some of the traditional divisions between different types of religion/state relationships.

Scholars have a natural inclination towards coherent groupings of approaches (and, indeed, most of this chapter will undertake precisely such a grouping exercise). But the distinctions between *Neutralia* and *Pluriana*, as described by McCrudden and Scharffs in [chapter ten](#), to the extent that they ever were satisfactory, are blurring now. The *Lautsi* case, discussed in more detail in other contributions, is a good example. While one can turn to the Grand Chamber decision as a victory for a pluralistic, but inclusive, conception of the relationship between Church and state there are other, less benign readings as well. It could be seen as a straight-out victory of a form of Christianity that sees itself as the historical (and exclusive) religion of Europe, entitled to more consideration and space than other religions. This possibility is underlined by the earlier cases dealing with the headscarf worn by Muslim women where the European Court held that individuals' wearing such garb in public education institutions was inherently aggressive, proselytising and a threat to women's equality. By contrast, the crucifixes mandated by the Italian state in every public school were characterised by the Court as inherently passive and, if they had an implicit message, it was one of the importance of Christianity in the history of democracy and liberalism. Such expressly approving words for the symbols of Christianity when combined with a deeply critical analysis of the symbols of Islam begins to look less like the tolerant pluralism described by some who approved of the decision and more like religious majority triumphalism. Yet the picture is a step more complicated, because at first instance the Court had come to the opposite decision, saying that the display of crucifixes was inconsistent with the neutrality required by the European Convention. This would suggest a Europe (probably influenced in part by the stricter notions of separation in the United States) which was shifting in legal terms to become less *Pluriana* and more *Neutralia*. The shifts in the position of the Court at first instance and then in the Grand Chamber demonstrate how contested this area is in Europe.

Other jurisdictions also show signs of disruption to the status quo. Issues such as the extent to which religious garb is permitted in public institutions have become a flash-point of tension as various societies try to come to terms with religiously diverse communities. There has been no uniformity of approach even within a single jurisdiction and certainly none between the various jurisdictions. In the *Pillay* case (discussed in more detail in van der Vyver's [chapter twelve](#)) the South African Constitutional Court put a high premium on inclusion and diversity, values which have particular significance in the context of a still developing liberal democracy that includes a wide variety of different racial, ethnic and religious groups. But when religious diversity was put in direct conflict with discrimination norms in *Styrdom*, the seminal importance of non-discrimination in a country which had been blighted by systemic inequality meant that the Church was held to account for dismissing an organist for his homosexuality. (Although, as van der Vyver points out, this does not mean that equality law is applied indiscriminately to religious groups in the South African legal system). In the United Kingdom, the courts have taken a relatively nuanced approach to the wearing of religious symbols or garb, but have left a fair degree of space for regulation as long as there

is a serious reason underpinning it (for example, the threat to the health and hygiene of both patients and staff if a nurse was permitted to wear a cross with her uniform in *Chaplin*). However, it is also clear that these decisions do not simply give the government carte blanche to interfere with religious clothing and in cases where decisions to restrict religious symbols on individuals have no reasonable grounds, the courts have been prepared to find against the restriction. And, as Babie and Krummery-Quinn discuss in their (chapter thirteen) analysis of Australia, there are countries that have managed to find a relatively harmonious series of compromises on issues such as the wearing of religious clothing and symbols without substantial interference by the law or courts.

The rapidly moving pace of legal and social/political developments in the area of religion–state relationships makes neat categorisation a fraught task. Every *Neutrality* turns out to have elements of *Plurality*; the secularist states embrace secularism in some areas and vice versa; bills of rights are portrayed as both essential to and undermining of religion. And compromises between two sets of values that both still have social salience (such as non-discrimination and religious freedom) can be seen by each side as a betrayal of fundamental values.

One of the places where these tensions and attempts to compromise play out in a particularly stark way is the workplace. The courts are turned to in order to resolve conflicts, including those where religious employees claim to be discriminated against by secular employers and where religious employers claim the right not to comply with ordinary secular employment laws. This chapter focuses on the second set of cases where the group aspect of religious freedom comes into conflict with the rights of actual or potential employees, particularly the right not to be discriminated against on a range of grounds including religion, sex, marital status and sexuality.

## II. FOUR APPROACHES TO RELIGIOUS AUTONOMY AT WORK CASES

This chapter outlines four basic approaches that various liberal legal systems can adopt to negotiate the tensions that are created by these cases, while acknowledging that a variety of permutations and combinations often exist alongside one another in particular systems. The focus of analysis is on liberal legal systems that try to treat all religions with concern and respect – if not always precisely *equal* concern and respect – and in which the secular and spiritual realms have a reasonable degree of separation. Such systems also maintain respect for the principles of non-discrimination with regard to such characteristics as race, sex, sexuality, disability and so forth. Systems that are not liberal in this sense obviously have a wider range of potential courses of action, from promotion of the interests of only one (or a small group) of religions at the expense of all other religions to the denial of any recognition of religious autonomy to any religious group.

For the purposes of this chapter, the four approaches will be referred to as the ordinary law, immunity, procedural fairness, and rights balancing approaches. Briefly, ordinary law treats religious employers in the same way as any other employer similarly situated. The immunity approach creates a realm of activity with respect to which the secular courts do not exercise jurisdiction with respect to religious employers. The procedural fairness approach requires that religious employers offer employees a minimum set of procedural protections, but not necessarily substantive protections. The balancing

approach requires that the rights of both the religious employer and the rights of the employee (or any other relevant party, such as the person to whom the service is provided) are taken into account in determining the outcome of particular cases. Each approach is examined in turn.

### A. The Ordinary Law Approach

The ordinary law approach subjects religious employers to the same laws as all other similarly situated employers. The ordinary law approach is the one most feared by religious groups that value their autonomy and most commonly proposed by those who are concerned about improper religious influence or privilege.<sup>1</sup> In many areas of legal regulation this is the obvious approach, with religious employers or individuals usually not given any special treatment in their obligation to comply with the ordinary criminal law, most aspects of health and safety, environmental standards, and building standards. In the employment context, however, the ordinary law approach is contested.

It should be noted that such an approach would not leave religions completely vulnerable. Most anti-discrimination regimes have some type of genuine occupational requirement exception that permits what would otherwise be discrimination if it can be shown that the trait is a genuine requirement of the job.<sup>2</sup> In the religious context, it would then become a matter of deciding where the appropriate line should be drawn in determining what is genuinely required by a particular position. A strong case can be made that religious affiliation is essential for positions of religious leadership, particularly ministerial or clerical positions. Likewise, a very good case could also probably be made for traits such as gender or sexual orientation (insofar as they are considered by the religion to be essential for those in leadership positions) to also fall within the scope of a genuine

<sup>1</sup> The Grand Chamber of the European Court of Human Rights recently refused to hear a series of cases decided by the Fourth Section regarding whether the law in the United Kingdom adequately protected the right to freedom of religion. European Court of Human Rights, 'Requests for referral to the Grand Chamber rejected' (Press Release, ECHR 161, 28 May 2013) (rejecting Application nos 48420/10, 59842/10). The Fourth Section had ruled that a British Airlines employee had the right to wear a cross, but that a hospital employee did not. *Eweida and Chaplin v United Kingdom* (Application nos 48420/10, 59842/10). Some reports in the press suggested that these cases represented the imposition of secular liberalism (see Lord Carey, 'How can it be a hate crime to show your faith in Christ?', *Daily Mail* (London, 3 September 2012): [www.dailymail.co.uk/news/article-2197862/How-hate-crime-faith-Christ.html](http://www.dailymail.co.uk/news/article-2197862/How-hate-crime-faith-Christ.html) (accessed 6 September 2012); C Mackenzie "'Why I will fight to bear my Cross": Four devout British Christians take their battle for religious freedom to human rights judges', *Daily Mail* (2 September 2012): [www.dailymail.co.uk/news/article-2197076/Four-devout-British-Christians-fight-religious-freedom-landmark-case-European-Court-Human-Rights.html](http://www.dailymail.co.uk/news/article-2197076/Four-devout-British-Christians-fight-religious-freedom-landmark-case-European-Court-Human-Rights.html) (accessed 6 September 2012)); others argued that the general law should apply to govern employment conditions, including the capacity of employers to develop jewellery policies for health and safety reasons (see D Barrett, 'Christians have no right to wear cross at work, says Government', *The Telegraph* (London, 10 March 2003): [www.telegraph.co.uk/news/religion/9136191/Christians-have-no-right-to-wear-cross-at-work-says-Government.html](http://www.telegraph.co.uk/news/religion/9136191/Christians-have-no-right-to-wear-cross-at-work-says-Government.html) (accessed 6 September 2012)).

<sup>2</sup> For example, the European Union has explicitly addressed this issue in Council Directive 78/2000/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16. The European Union is cognisant of the problems that this may create for religious groups. It states in Article 4(2) that: 'Member States may maintain national legislation in force . . . or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations whose ethos is based on religion or belief, a difference of treatment based on religion or belief of a person shall not constitute discrimination where, by reason of the nature of these activities or the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos'.

occupational requirement for those religions. So, the ordinary law approach would accord religions some scope to require, or at least make a case for the necessity of, particular employees being of a particular faith, sex, sexuality and so forth.

One of the main strengths of this approach is that it is relatively straightforward and clear. Both employers and employees will generally know when the law applies to them because it almost always will apply. The area of complication will arise on the boundaries of what falls into the genuine occupational requirement exception. However, this category is likely to be relatively small and only raise questions around applicability in a limited number of cases.

Such an approach places a high value on two understandings of equality. The first is the respect for the equality of all actual and potential employees who will generally be protected from discrimination on the basis of race, sex, religion, disability or similar classifications. It is an easy point for those who see this debate wholly through a religious lens to overlook. The non-discrimination commitment is an important one – particularly to those who are vulnerable to discrimination – but also to the societies that implemented such laws. Creating exceptions, exclusions, and special treatment to protect religious organisations from the full impact of those laws undermines both their practical and symbolic importance.<sup>3</sup> Those who approach this debate from a non-discrimination point of view (or a standard labour law point of view), rather than a religious autonomy point of view, recognise the potential for wide exclusions to undermine the efficacy of laws that have been put in place to protect relatively powerless employees.

The genuine occupational requirement exception forces religious employers to articulate and justify the necessity of restrictions on certain positions rather than simply assuming them. When religious organisations are substantial employers that play a significant role in certain economic spheres (for example, running schools or hospitals) it becomes even more important to ensure that the large number of employees working for them are not left unprotected without good reason.<sup>4</sup>

Secondly, the general law approach also promotes an economic or competitive understanding of equality between similarly situated employers within a given market. If the state or a secular employer that runs a hospital is bound by a much wider range of regulation than the religious hospital across the road, it is placed at a competitive and economic disadvantage. There is a cost of compliance with non-discrimination and other workplace laws and those who are not bound by those regulations are placed at a competitive advantage. While such economic arguments should not in themselves be sufficient to undermine the right of religious autonomy, they provide another argument in favour of a general law approach.

Despite these advantages, there are several problems with relying solely on the general law approach to manage the relationship between religious employers and employees. The most salient is that it will generally require secular courts or tribunals to make determinations regarding what constitutes a genuine occupational requirement and, critically, this is a question where there is room for substantial value-based disagreement.

<sup>3</sup> See, eg R Sandberg, 'The right to discriminate' (2011) 13 *Ecclesiastical Law Journal* 157, 171–72; A McColgan, 'Class wars? Religion and (in)equality in the workplace' (2009) 38 *Industrial Law Journal* 1.

<sup>4</sup> Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Leichhardt NSW, Federation Press, 2012) 166.



An example from Australia illustrates this point as well as some of the contextual complexity. In *Walsh v St Vincent de Paul Society Queensland (No 2)*,<sup>5</sup> the President of the St Vincent de Paul Society was forced to resign because she was not Catholic, even though this had been known to the Society when she became President, and she had acted in the role of President for some time.<sup>6</sup> The Anti-Discrimination Tribunal of Queensland held that there was no genuine occupational requirement that she be Catholic. The relevant test had two parts: the first was an 'objective' determination of whether being a Catholic was a genuine occupational requirement, and the second was a determination as to whether the complainant was capable of fulfilling the genuine occupational requirements.<sup>7</sup> The Society failed on the first ground with the Tribunal holding that, despite theological evidence to the contrary, it was possible for a non-Catholic to carry out the functions of President of a conference even if it might be more desirable for a Catholic to do so.<sup>8</sup> The fact that the President of a conference of St Vincent de Paul had certain limited religious obligations (such as saying prayers at the start of meetings), among many other obligations, did not mean that her duties involved religious practices or observances.<sup>9</sup>

While the tests set out by the Tribunal appear objective, the decision that has to be made ultimately requires the decision-maker to make a value judgement. It is not straightforward to evaluate the importance of religion in roles that combine religious and secular functions. Moreover, in this case the applicant was not non-religious or anti-religious, she indeed shared many of the same religious beliefs as the Catholic members of the Society, but she was not herself Catholic. For a secular tribunal to determine exactly *what type* of religiosity is required for a role is even more complicated than deciding that *some* religious commitment is required. Adding to the complexity in that case was the fact that the President had been allowed to carry out the role for some time with no apparent problems. It is going to be harder for an organisation to say that a characteristic such as religious belief is a genuine requirement when it has been employing people who do not have that characteristic when convenient.

For those concerned with religious autonomy, a particular worry about this process is that non-discrimination tribunals, labour courts or other tribunals in which such cases will ultimately be determined are perceived to be committed more to maintaining the general and secular protections of labour law and may have little or no understanding of religious sensibilities, teachings or beliefs.<sup>10</sup> Whether this is demonstrably the case or not will differ between jurisdictions and particular courts or tribunals within jurisdictions. However, it is probably reasonable to assume that a court or tribunal that is established to implement labour laws or to ensure compliance with anti-discrimination laws is likely to have members who have greater understanding of and sympathy towards those who

<sup>5</sup> *Walsh v St Vincent de Paul Society Queensland (No 2)* [2008] QADT 32 (12 December 2008) (Australia).

<sup>6</sup> *ibid*, 124.

<sup>7</sup> *ibid*, 88–89. Further, the onus was on the Society to demonstrate that it was a genuine requirement: at [80].

<sup>8</sup> *ibid*, 123. (Being a Catholic was 'not essential and indispensable to carrying out the duties of president, although it may well be desirable, and I think that the position, overall, would be essentially the same if there were no requirement that a president be Catholic'.)

<sup>9</sup> *ibid*, 77.

<sup>10</sup> R Williams, 'Civil and Religious Law in England: A Religious Perspective' (Foundation Lecture, Temple Festival series at the Royal Courts of Justice, London, 7 February 2008): [www.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective](http://www.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective).

seek to maintain the integrity of the labour/discrimination systems than those promoting the protection of religious autonomy.

The general law approach excludes at least one type of religious employer by making it effectively impossible to create an organisation on any scale that only employs co-religionists. Religious organisations commonly reject the distinction between those whose roles *require* them to be of a particular religious background and those roles that do not. They often argue that they wish to create an employment environment where all employees share the same values and can communicate them in a coherent and effective way to those who use the service provided by the organisation. Such arguments are put particularly strongly in an organisation such as a school where it is argued that all members of staff (and not just those determined by an external body to have a 'genuine occupational requirement') need to share and provide examples of the religious ethos of the school in order to effectively communicate the importance of those values to students.<sup>11</sup>

## B. The Immunity Approach

The second approach is the immunity approach, which expressly carves out some areas or roles from the usual protections of various types of labour – or other – laws. A common example is the 'ministerial exemption' rule that, in some legal systems, leaves the employment of ministers effectively a matter solely governed by the rules and processes of the religious organisation involved. The organisation does not have to prove anything other than that the person is a minister for the purposes of the exemption. It then does not have to show that its treatment of the person was in compliance with the teaching of the religion, that it behaved reasonably, or anything further. The courts simply have no role within this approach beyond determining if the situation falls within the exemption. A number of advocates for religious organisations would like to see a very wide exemption for religious employees for all kinds<sup>12</sup> – not simply ministers – while others are concerned by the notion of any immunity at all.<sup>13</sup>

The immunity approach does not raise the same concerns as the first option regarding the potential secular interference in core religious decision-making. It creates a zone in which religious people, acting communally, can live out their faith without state interference and it is therefore far more protective of religious autonomy than the first option. Once the boundary line as to what is protected by the immunity and what is not is set, it also becomes a relatively simple test (although, as discussed below, setting those boundaries is not a straight-forward exercise). Once the immunity applies, then both employer and employee understand that a particular set of laws does not apply to their relationship. As

<sup>11</sup> See P Parkinson, 'Christian Concerns about an Australian Charter of Rights' (2010) 15 *Australian Journal of Human Rights* 83, 94; See also P Parkinson, 'Religious Vilification, Anti-Discrimination Laws and Religious Minorities in Australia: The Freedom to be Different' (2007) 81 *Australian Law Journal* 954, 963; C Durham, 'Individual and Institutional Academic Freedom at Religious Colleges and Universities' (2003) 30 *Journal of College and University Law* 1.

<sup>12</sup> Parkinson, 'Christian Concerns' (n 11 above); R Mortensen, 'A Reconstruction of Religious Freedom and Equality: Gay, Lesbian and De Facto Rights and the Religious School in Queensland' (2003) 3 *Queensland University of Technology Law and Justice Journal* 320.

<sup>13</sup> See for example M Minow, 'Should Religious Groups be Exempt from Civil Rights Law?' (2007) 48 *Boston College Law Review* 781; IC Lupu, 'Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination' (1987) 67 *Boston University Law Review* 391.

with the first approach, this has the virtue of being relatively clear, but because the usual non-discrimination and other labour laws *do not* apply in most cases.

A recent case from the United States Supreme Court, *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*,<sup>14</sup> illustrates the immunity approach with respect to ministers. The petitioner in this case was the Hosanna-Tabor Evangelical Lutheran Church and School ('Hosanna-Tabor'), which is a member congregation of the Lutheran Church-Missouri Synod, the second largest Lutheran denomination in the United States. The Synod classified the school teachers it employs into two categories: 'called' and 'lay'. Once 'called', a teacher receives the formal title of 'Minister of Religion, Commissioned'. The function of these called teachers was mixed and included teaching secular subjects as well as teaching religion classes, leading students in daily prayers and devotional exercises, and leading chapel services.

The respondent in this case was Cheryl Perich, a former 'called' teacher of Hosanna-Tabor. During her employment, the respondent developed a sleep disorder and so took disability leave. The respondent tried to return to work in the following year but ultimately had her position terminated. She claimed that her position had been terminated because of her illness and was thus unlawful. Hosanna Tabor said that her employment had been terminated because she had refused to comply with the internal Church mechanism for resolving disputes. More significantly, however, Hosanna Tabor claimed that Perich was a minister and thus fell within the ministerial exception created by the First Amendment to the US Constitution. While the existence of the exemption was denied by Ms Perich, the Supreme Court found in favour of the petitioner 9-0 holding that the Constitution required that the determination of who is employed, and whether or not their employment is terminated, as a minister was solely a matter for the religious organisation:

The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.<sup>15</sup>

The court also adopted a relatively wide definition of a minister for constitutional purposes and did not limit it to the head of a religious congregation. While the test was not wholly subjective, the court took into account factors including '[t]he formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church'.<sup>16</sup> The fact that lay teachers performed most of the same functions and that most of Perich's time was spent on ordinary teaching were not sufficient factors to change this outcome. Perich's termination of employment was therefore not for review by the courts and the discrimination statute had to give way to the constitutional protection of religious autonomy rights.

The immunity approach, as illustrated in *Hosanna-Tabor*, has a number of concerning aspects. The first is that either the determination of the boundary line between what is covered by the exemption is in the hands of secular authorities or secular authorities

<sup>14</sup> *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*, 132 S Ct 694; 565 US \_\_\_\_ (2012) (United States).

<sup>15</sup> *ibid*, 706.

<sup>16</sup> *ibid*, 708.

take such a 'hands off' approach to this determination that religious groups could simply define the majority of their employees into the excluded realm.

When the determination is in the hands of a secular authority, however, there will be definitional disputes and considerable room for disagreement. Take the ministerial exemption. This is comparatively easy to apply in a society where the religions are relatively similar in structure and have a clearly distinguished hierarchy – priests, bishops, monks etc – of full-time professional religious leaders who are limited in number and relatively easily distinguished from the laity. However, once societies are more multi-religious (as most liberal democracies now are), it becomes a more complicated task to draw these lines. If immunity for ministers is recognised, a society that treats all religions with (at least roughly equal) concern and respect will need to find ways of recognising and protecting a plethora of different religious leadership structures. To fail to do so would be to discriminate against some religious groups, but to find a test that is sufficiently inclusive but also sufficiently robust that it draws a clear line is an almost impossibly difficult task. The type of test adopted by the court in *Hosanna-Tabor* places a good deal of emphasis on the way in which the church and the employee describe the role rather than the functional or more objective aspects of the position, which is one way of trying to deal with the dilemma of how to define a ministerial role without intruding on religious matters.

If the determination of who is a minister is left largely in the hands of religious groups – and there are substantial legal benefits to having employees fall inside the exemption – then there is an incentive for creeping clericalisation. It then becomes beneficial for religious employers to inject ministerial aspects into other roles for legal rather than purely religious reasons. While the immunity approach appears beneficial to religious organisations insofar as it leaves them a greater scope to make their own employment determinations, it nonetheless has an impact and influence on religious groups, which may start to extend notions of ministry in response to the legal benefits that accrue from such a category rather than as a matter of pure faith or conviction.<sup>17</sup>

A second serious concern arises from this approach, as it gives no weight at all to the rights and interests of the employee or potential employee. Their treatment can be arbitrary, malicious and discriminatory, and yet is not open to scrutiny even when the connection with religious teaching is remote. In the *Hosanna* case, the teacher in question was said not to comply with the teachings of the church because she did not comply with its teachings on settlement of disputes. However, under the test, the school could have terminated her employment simply for being ill (or on any other basis that it chose).

Religious organisations are large employers in areas such as education, health and welfare, and there is a very real possibility that an extended immunity approach may potentially leave a very substantial number of employees without some basic legal protections. A common response to this concern is that such people can simply find work elsewhere, in other jobs not subject to the same restrictions. By doing this, it is argued

<sup>17</sup> For example, in 2012 there have been two cases, determined concurrently, in the Kentucky Supreme Court involving a religious school; the 'Disciples of Christ'-operated Lexington Theological Seminary. Both of the appellants were dismissed academic staff, and the court found that they were considered to be Ministers, and consequently judicial review of their dismissal was prohibited by the First Amendment. What is striking is that in neither case was the appellant a member of the religion, Mr Kant was Jewish and Mr Kirby was a Methodist: *Kant v Lexington Theological Seminary*, KY 2011-CA-000004-MR (2012) (United States); *Kirby v Lexington Theological Seminary*, KY 2010-CA-001798-MR (2012) (United States).

that religious freedom is preserved while no real harm is caused to the individual, as they have merely had their range of options slightly reduced.

This has always been a dubious argument. Termination from employment, in particular, is confronting and hurtful for individuals and being rejected for a job is also damaging. Now, as the economies of many Western countries face upheaval and uncertainty and unemployment reaches very high levels, the notion that people can simply 'get another job' becomes an even dubious response to those who seek employment on a non-discriminatory basis. It is worth noting that a similar argument is made by those who say that religious people should either adapt themselves to secular workplaces or find employment elsewhere. There can certainly be double standards used by those on each side of this debate who are outraged at the termination of employment in one type of case, but supportive of it in another. While they are not precise moral or legal equivalents, the positions of religious employees of secular employers or of non-conforming employees of religious employers have some similarities.

### C. Procedural Fairness Approach

A procedural fairness approach requires religious employers to afford at least minimal fair process requirements to their employees or, alternatively, requires the courts to ensure that employers are afforded procedural fairness in the courts when challenging decisions of religious bodies. The protection of procedural fairness is incompatible with an immunity approach because that approach puts decisions beyond the review of the courts. The procedural fairness approach grants courts the capacity to exercise oversight of the decision-making of the religious bodies and, as a consequence, it encourages religious bodies themselves to accord procedural fairness to employees in matters such as termination of employment.

The scope of the required procedures may differ from jurisdiction to jurisdiction and the precise contours of this approach are still in the process of being refined. Its elements probably include the requirement that religious organisations be clear and explicit with potential employees about the particular religious requirements that may go beyond usual employment conditions. For example, if a religious school has a policy of not employing anyone who has an extra-marital relationship then this needs to be made clear to potential employees rather than penalising someone for this behaviour after the fact. Procedural fairness may also require that when a person is said to have acted in breach of religious requirements, there should be some chance for that person to know the nature and substance of the allegations of misbehaviour made against him or her and some chance to respond to them. The employee should then have the ability to take the case to an independent court/tribunal that has power to review the processes, but not the substance, of the claim. The court, for example, could determine that the employee should have been given a chance to respond to an allegation that he had engaged in an extra-marital affair but the court would not interfere in the conclusion that an extra-marital affair was sufficient basis for dismissal (at least as long as the employee had had notice that it was).

An example of this approach can be found in the European Court of Human Rights case, *Lombardi Vallauri v Italy*.<sup>18</sup> Professor Lombardi Vallauri had his employment at a

<sup>18</sup> *Lombardi Vallauri v Italy* (App no 39128/05), 20 October 2009 (ECtHR).

Catholic university terminated after 20 years of having it renewed annually, because the Congregation of Catholic Education, an agency of the Holy See, refused to give a necessary approval.<sup>19</sup> No reason was given for the refusal beyond noting the Congregation's concerns that some of Professor Lombardi Vallauri's positions 'clearly go against Catholic doctrine'.<sup>20</sup> It was not specified which positions were in question, or which doctrines they were said to conflict with, and the Professor was not given an opportunity to defend himself or challenge the allegations.<sup>21</sup> He brought a case challenging his effective dismissal in the Italian courts and the Council of State ultimately decided the matter by holding that "no authority of the Republic can evaluate Church authority" . . . it is outside their scope of jurisdiction'.<sup>22</sup> This is effectively an immunity approach and was challenged by the applicant who complained of the breach of several rights in the European Convention on Human Rights, including Article 9 (religious freedom).<sup>23</sup> Ultimately, however, the European Court of Human Rights decided only on the claims that Article 10 (freedom of expression)<sup>24</sup> and Article 6 (fair hearing)<sup>25</sup> rights were breached. It found for the applicant in both instances.<sup>26</sup> In so doing, the European Court implicitly held that respect for religious autonomy meant that it was not for secular courts, including the European Court of Human Rights, to make determinations on religious teachings or orthodoxy.<sup>27</sup> The key issue for the Court was that the questions of breaches of orthodoxy were not put to the applicant and thus he could not challenge them.<sup>28</sup>

It thus concluded that the Italian government had not demonstrated that 'the University's interest in providing education based on Catholic doctrine could not extend to undermining the essence of the procedural safeguards' to which the applicant was entitled before his Article 10 rights were limited.<sup>29</sup> Similarly, the European Court found a breach of the Article 6 fair hearing right on the basis that the national courts had not allowed for a challenge to the absence of information on the claims against the Professor or the link between those claims and his teaching role.<sup>30</sup> The European Court directly rejected the argument that the decisions of the Holy See should be immune from challenge in the Italian courts.<sup>31</sup>

This approach has some real advantages. However, it sits uneasily between courts refusing to engage with religious employment issues and courts dealing with the substance of the dispute as they would with any other employer. The procedural fairness approach gives a reasonable degree of deference to religious autonomy. A religious employer can determine for itself what its core values are and how these will be applied to potential and actual employees insofar as these values are communicated to employees, and their application allows for a minimum of procedural fairness.

<sup>19</sup> *ibid.*, 5–10.

<sup>20</sup> *ibid.*, 8.

<sup>21</sup> *ibid.*, 11–12.

<sup>22</sup> *ibid.*, 18.

<sup>23</sup> *ibid.*, 57–58.

<sup>24</sup> *ibid.*, 56.

<sup>25</sup> *ibid.*, 72.

<sup>26</sup> *ibid.*, 56, 72.

<sup>27</sup> *ibid.*, 50.

<sup>28</sup> *ibid.*, 52.

<sup>29</sup> *ibid.*, 55.

<sup>30</sup> *ibid.*, 71–72.

<sup>31</sup> *ibid.*, 60.

A procedural fairness approach implicitly recognises that once an organisation has immunity from scrutiny there is a danger that it can use its authority in a manner that is arbitrary, malicious, ill-informed or hasty. Even if it is accepted (which it certainly is not by all) that infringements of the sexual mores of a religion constitute a good ground for the termination of employment from a religious organisation, it does not necessarily follow that all such terminations are beyond scrutiny. Someone may have been accused of religious misconduct by a co-worker who has a personal grudge, or by a supervisor who simply dislikes the employee, or even by someone who is honestly mistaken about the facts. If there is no requirement to even tell the person the basis of their dismissal or give them a chance to challenge the facts then serious wrongs can be done that have little to do with preserving the religious values and identity of the organisation.

Requiring religious employers to be clear about the types of behaviours that they require that go beyond usual workplace conditions may also be a sensible precaution in times of increasing religious diversity. Vague admonitions to respect the values of the religious organisation might be understood by different employees quite differently. For example, a gay school teacher might think that this means that he should not talk about his sexual orientation at school or bring his partner to school functions. The school, however, might believe that it means that he cannot be in a same-sex relationship even if it is kept wholly separate from his work life.<sup>32</sup> Thus, there are real strengths to the procedural fairness approach as a minimum that might be expected of religious employers in systems where many of the ordinary protections of law do not apply to employees of a religious employer.

#### **D. Rights Balancing Approach**

The final approach is one that balances competing rights and significant interests of the employer and employee. Such an approach does not accept that religious autonomy is a value that cannot be negotiated or is entitled to some primacy over other interests. Nor does it say that it is morally or legally irrelevant. Rather religious autonomy is one of a number of rights and values taken into account. This describes the approach taken by the European Court of Human Rights in some recent employment cases or, perhaps more precisely, it is the approach that the European Court requires of Member States. As a supervisory court, the European Court has not become deeply engaged with *how* different rights are weighed but it does require that all relevant rights are weighed by national courts, which are presumed to be better connected with the values and attitudes of the people that live within their jurisdiction.

The benefit of this approach is that it is nuanced and recognises that there are multiple competing claims in play. That does not mean that everyone will be happy with the outcome – in fact, most likely one party will be unhappy – but each party at least has a chance for their interests to be taken into account. The balancing approach is unappealing to those who believe that religious autonomy is of such significance that it must prevail over all other considerations and it is likewise unattractive to those who consider non-discrimination to be substantially more important than religious autonomy. However, it is

<sup>32</sup> See C Evans and B Gaze, 'Discrimination by Religious Schools: Views from the Coal Face' (2010) 34 *Melbourne University Law Review* 392, 411–14.



generally more appealing to each group than an approach that does not take their interests into account at all.

The balancing approach is arguably the most consistent with a human rights based approach as well. There is no recognised absolute hierarchy of human rights within the international human rights system or most domestic legal systems,<sup>33</sup> even if claims are sometimes made for the primacy of particular rights (including religious freedom and non-discrimination). Each of the immunity and general law approaches effectively gives substantial weight to one set of rights with little or no consideration for the other rights at stake. The rights balancing approach, however, requires that all relevant rights be taken into account rather than dismissed out of hand.

However, there are a number of problems with this approach as well. The most significant is that it is unpredictable and runs the risk of incoherence. It requires the courts to engage fairly directly in value judgements and there will always be concerns that courts are inappropriate or ill-equipped to make such judgements and a fear that there will be a judicial thumb on the scales when there are difficult decisions. This can leave both employer and employee unsure about their legal obligations and rights. While a body of case law over time might help to clarify the typical situations where the balance may fall one way or another, the particular facts in any given case will always give rise to questions about whether they are sufficiently different to previous cases to justify a different weighting.

The difficulty in predicting the outcomes of these cases can be seen in two cases that were handed down on the same day by the same Chamber of the European Court of Human Rights. In the *Obst* case, Michael Obst was dismissed from his employment as the Director for Public Affairs in Europe for the Church of Jesus Christ of the Latter-Day Saints or Mormon Church.<sup>34</sup> He admitted to his superior that he was having an extra-marital affair and, as this was a serious offence within the Church, his employment was terminated without notice. The decision of the Church was ultimately upheld by the German courts and was also upheld by the European Court of Human Rights. The second case was that of *Scüth v Germany*.<sup>35</sup> Mr Scüth was an organist in a Catholic church in Germany. He left his wife and began living with another woman, who later became pregnant to him. When this became known, his position was terminated on the basis that he breached the teachings of the Church that he was required to adhere to as a condition of his employment.<sup>36</sup> Again, the German courts ultimately upheld the decision of the Church.<sup>37</sup> However, despite the apparent similarity between the two cases, in this case, the European Court held that Mr Scüth's rights had been violated.<sup>38</sup>

The reasoning of the European Court was brief in each case, but in *Obst* the Court accepted that the moral requirements for holding the role were made clear to the applicant whereas they were not set out as clearly to Mr Scüth.<sup>39</sup> More importantly, the German courts in *Obst* were held by the European Court to have taken into account the

<sup>33</sup> See T Koji, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights' (2001) 12 *European Journal of International Law* 917; See also T Meron, 'On a Hierarchy of International Human Rights Law' (1986) 80 *American Journal of International Law* 1.

<sup>34</sup> *Obst v Germany* (App no 425/03), 23 September 2010 (ECtHR).

<sup>35</sup> *Scüth v Germany* (2011) 52 EHRR 32 (ECtHR).

<sup>36</sup> *ibid*, 8.

<sup>37</sup> *ibid*, 35.

<sup>38</sup> *ibid*, 75.

<sup>39</sup> *ibid*, 69.

relevant rights and interests of both the religious employer and the employee,<sup>40</sup> whereas in *Sciùth* they had only considered the rights and interests of the Church.<sup>41</sup>

This relatively recent line of cases, in combination with the *Lombardi Vallauri* case, makes clear that the immunity approach is seen by the European Court to be generally incompatible with human rights because it fails appropriately to account for the interests of the employee. It is also clear from these cases that the European Court accepts that religious groups might set different employment standards (including those that would be incompatible with ordinary employment law) and that these can be upheld by the state, at least to a degree, without a breach of human rights.

The *Obst* and *Sciùth* cases demonstrate both the strengths and weaknesses of the rights balancing approach. On one viewpoint, the fact that two such similar cases could have different outcomes demonstrates the ability of the Court to make nuanced and context-specific decisions that will sometimes be of benefit to the religious employer and sometimes to the employee. Alternatively, the outcomes of the two cases could be used to illustrate the unpredictability of the rights balancing approach, and in particular the extent to which they involve the courts in difficult value judgements that might mean that a case turns on a relatively insignificant fact.

### III. CONCLUSION

As this brief analysis demonstrates, there is no ready solution to the tension between the competing claims of religious autonomy and other social values, including non-discrimination, the protection of labour rights, and the protection of those looking for freedom *from* religion (including religious symbols). In the workplace context, each of the solutions outlined in this chapter has limitations and will be considered inappropriate or unworkable by those on one side of the debate or the other. Similarly, with respect to symbols, there is no easily or universally agreed resolution either, with growing disputes about the meaning and import of particular types of symbols (consider the very wide range of meanings attributed to the wearing of the headscarf by Muslim women, for example). Despite this tension, governments and courts cannot walk away from their responsibilities to resolve these issues either at a policy level or in the application in a particular case.

The possibility of resolution is further complicated by the fact that, as discussed in the introduction, we are currently in a time of transition with respect to both religious belief and commitment to non-discrimination. Religious belief is declining in most Western democracies. An increasing number of people are likely to define themselves as not being religious, and among those who are religious the degree of religious commitment varies substantially. Religious diversity has also been growing in a number of Western democracies with Christianity claiming a smaller share of religious believers than it has in the past.<sup>42</sup>

<sup>40</sup> *Obst v Germany* (App no 425/03), 23 September 2010, [45] (ECtHR).

<sup>41</sup> *Schiùth v Germany* (2011) 52 EHRR 32, [74].

<sup>42</sup> M Hill, R Sandberg and N Doe, *Religion and Law in the United Kingdom* (Alphen aan den Rijn, Wolters Kluwer, 2011) 22–23; For a description of religion in demographics in Australia see Evans, *Legal Protection of Religious Freedom in Australia*, 3–4; A 2008 survey of religious identification in the United States has seen religious diversity increase very slightly from 3.3% to 3.9% between 1990 and 2008 (those claiming a religious belief other than Christianity); in contrast, persons claiming no religion have grown in America from 8.2% to

At the same time as the religious landscape has grown more complicated, there is also a growing social commitment to non-discrimination that is reflected in both laws and social attitudes. The relatively rapid transformation of homosexual relationships from ones that were prohibited by criminal law to ones that are protected against most forms of discrimination in most liberal democracies is a case in point. In Australia, in the mid-1990s, the State of Tasmania fought the Federal Government to protect its laws that criminalised sodomy.<sup>43</sup> In 2012, the Tasmanian Premier announced that Tasmania wanted to become the first Australian State to allow for gay marriage.<sup>44</sup> While non-discrimination norms do not hold universal adherence, they now have much more widespread social acceptance than they did when the first non-discrimination laws were introduced. Indeed, many religious people are committed to principles of non-discrimination even in circumstances where this might bring them into conflict with the teachings of the religion to which they belong.

All this means that it is a particularly difficult time in which to create law and policy that appropriately account for a range of different worldviews and political commitments. Such positions range from those who are opposed to secular interference in religious organisation, to those who seek to promote uniform workplace protections, to those who perceive of religious organisations as simply playing a spoiler role with respect to employee protections. Similarly, there are those who see the restriction of religious symbols or clothing in any context as an outright attack on religion and those who see any religious symbolism in the public realm as undermining secular democracy and an affront to their religious freedom.

In such circumstances, some compromise between these competing worldviews tends to be the result. Such compromises may be the 'best possible outcome in the circumstances', even if it is not the 'best of all possible worlds' from one viewpoint or another. Legislative and judicial responses will often adopt a portfolio approach, for example taking an immunity approach to ministerial positions, a rights balancing approach to other direct employees of a religious organisation, and a general law approach to those who work for organisations such as schools or hospitals that are run by a religious organisation. Alternatively, incentives may be given to encourage religious employers to adhere to non-discrimination laws (such as access to government funding) rather than forcing legal obligations onto all players. In the symbols realm, it might be that a great deal of freedom can be given to individuals, a smaller amount to public institutions (perhaps to take into account historical importance) and very little to mandated public symbols. It may be that this is simply a somewhat messy interim stage that will ultimately be replaced by a clearer and more coherent set of responses as the relationship between religious and non-discrimination values crystallises in particular societies. However, it seems more likely that the conflict of values that is manifested in this particular set of religion and state issues will continue for a long time to come, and legal systems will continue to shift uneasily between solutions that will invariably be perceived as inappropriate by at least one set of interests in the debate.

15%: BA Kosmin and A Keysar, *American Religious Identification Survey 2008: Summary Report March 2009* (Hartford CT, Trinity College, 2009).

<sup>43</sup> Human Rights Committee, *Communication No 488/1992*, 50th session, UN Doc CCPR/C/50/D/488/1992 (4 April 1994) (*Toonen v Australia*).

<sup>44</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 30 August 2012 (L Giddings, Premier).

How might a comparative approach to the legal issues at stake in such cases assist in resolving or at least coming to 'good enough' solutions in the complex contexts outlined above? First, it can assist in developing a more comprehensive explanatory framework of the various options available to courts and legislators than an examination of a sole jurisdiction can provide. This is the primary purpose to which it has been put in this chapter. Such an explanatory framework can assist in opening a fuller and more nuanced debate than the sometimes simplistic political debates that focus on all or nothing options (for example, religious employers having complete freedom over the selection or dismissal of employees as compared with being completely subject to the ordinary law of employment). Such frameworks can provide a salient reminder of the variety of approaches that have been brought to the issue at hand and can warn against parochialism in assuming that the solutions that have been applied in a particular jurisdiction are the only ones worthy of consideration. As one practical example, it presents judges in a jurisdiction who come to the interpretation of a constitutional provision in the context of religious employment with a body of resources on which to draw in making a determination about the law in their own country. No responsible judge will ignore the particular, local context or simply adopt unthinkingly the views of a foreign court. However, they may take some comfort that they have considered a full range of arguments and alternatives by considering how these issues are dealt with elsewhere.

Secondly, an analysis of the experience of other jurisdictions in experimenting with different approaches to issues such as religious employment or symbolism can provide useful insights into the empirical claims that sometimes accompany arguments about the consequences of taking certain positions. The testing of such claims is a complex matter and would need to focus on what is different as well as what is similar about the jurisdictions in question, but it may cast greater light on the likely realities of taking a particular position than would pure theorising. For example, this chapter has discussed the balancing approach as giving rise to a level of uncertainty in outcomes that might cause practical problems for employers, employees and the courts. However, over the next few years, as the principles required by the European Court of Human Rights are applied in Member States, we will be better able to judge whether the problems of uncertainty are significant or whether the likely outcomes in a variety of cases become clearer. This may prove a useful testing ground for other jurisdictions that are currently struggling with the best way to resolve these complex issues. The experience of other states can act as both a useful guide for what might work and also a warning about the negative consequences of some positions.

Finally, comparativism, if undertaken with some nuance, demonstrates the way in which law is intertwined with culture, history and national self-perception. The way in which the French law responds to religious symbols is likely to be quite different to the way in which India responds, even if both use the language of secularity to describe their overall position. The conception of secularity and the legal/political responses to it are clearly shaped by culture and history. These are, however, not static and in an increasingly globalised era the pace of change has accelerated. Fifty years ago, it would have been difficult to predict the steep rise of the importance of equality (and the expansive range of differences to which the idea of equality would be applied) and substantial changes to the political and social position of religion in many Western nations. The complex impact that migration would have on both religion and equality would also have been difficult to anticipate and is still really being worked through in many countries. Watching the way in

which changing social and political contexts impact on law across a range of jurisdictions gives us insight into the interplay between these factors.

Comparativism does not provide simple solutions to complex problems. A judge being aware that three other jurisdictions have taken three different approaches to the problems of the application of equality law to religious employers does not in itself resolve the issue. Indeed, at one level it may complicate it. Comparativism does, however, provide a set of tools, insights and questions that may assist lawyers, judges and scholars to better understand the full dimensions of the issues at stake in complex cases such as the ones discussed in this chapter.



## *State Interference in the Internal Affairs of Religious Institutions*

JOHAN D VAN DER VYVER

### I. INTRODUCTION: THE FOCUS OF SPHERE SOVEREIGNTY DEFINED

THIS CHAPTER FOCUSES on the power of religious institutions to regulate their internal affairs independently and without outside interference. This is not so much a matter of either freedom of religion from the state or freedom of the state from religion but rather a consideration of a competence that vests in a religious entity the unfettered power to regulate its affairs according to the traditions and convictions of its faith, a competence of religious institutions to determine whom to admit within their ranks, whom to employ for the exercise of their calling, and what conditions to apply for the rendering of their services. Such competencies must be clearly distinguished from other manifestations of religious rights, such as freedom of religion, belief, and opinion, and the right of religious communities to self-determination.

This notion of what contemporary Calvinistic political thought commonly refers to as the internal sphere sovereignty of religious institutions vis-à-vis the agencies of state authority is more commonly referred to in German jurisprudence as ‘self-determination’ or ‘autonomy’ of religious institutions. This can be confusing, because the right to self-determination of religious communities (not religious institutions) has acquired a very special meaning in contemporary international law.<sup>1</sup> For purposes of this chapter, the concept of ‘autonomy’ is reserved for delegated powers of a subordinate authority within an overarching social institution of which that authority forms part.<sup>2</sup> Sphere sovereignty assumes that each social entity of a particular kind has sovereign powers to regulate its internal affairs without interference by social entities of a different kind.

Freedom of religion, belief, and opinion is by its very nature an individual right that can be exercised by everyone, either individually or in community with other individual members of a religious community. Freedom of religion can also take the form of a collective group right, a right that vests in an individual belonging to a particular category of persons. The rights of a child, for example, vest in individuals that fall within the

<sup>1</sup> See Johan D van der Vyver, ‘The Rights to Self-Determination of Religious Communities’ in John Witte Jr and M Christian Green (eds), *Religion and Human Rights: An Introduction* (Oxford, OUP, 2011) 236, 238–39.

<sup>2</sup> See text accompanying n 6 below.



category of persons under the age of 18 years.<sup>3</sup> Similarly, the self-determination of a religious community is a right 'afforded to individual persons belonging to a certain category' and more precisely belonging to 'every member of the group and [which] can be exercised separately, or jointly with any other member(s) of the group'.<sup>4</sup> The sovereign powers of a religious institution, by contrast, vest in the religious institution or organisation as such (and not in individual members) and are by their very nature an institutional group right (and not an individual right or a collective group right).<sup>5</sup>

A distinction should further be made between the exercise of power by an organisation in virtue of a concession granted to it by another organisation, on the one hand, and the exercise of internal authority by an organisation as of right, on the other. Contemporary Calvinism refers to the first instance of domestic authority as a matter of 'autonomy', and the second as a matter of 'internal sphere sovereignty'.<sup>6</sup> Autonomy in this sense is confined to instances where the organisation granting the power of domestic governance, and the recipient of such a grant, function within the enclave of a single social structure. The institution entrusted with autonomous power invariably forms part of an overarching organisation that grants the power and is essentially structured as a subordinate part of that overarching organisation. Autonomous powers may thus be delegated by a central governmental institution to regional and local political authorities within the domain of a single body politic. Autonomous powers may similarly be delegated by the central power base of a church institution to subordinate local congregations.

Sphere sovereignty, on the other hand, implies the relationship between two or more structurally distinct social entities, such as church and state.<sup>7</sup> Here the internal sphere of competencies of the respective institutions is not dependent on a concession by one to the other but belongs to each one in its own right and is founded on the existence and functioning of each as an independent component of human society. Quite often, constitutional provisions relating to freedom of religion or belief seem to suggest that the entitlements of religious institutions are a matter of autonomy; however, these entitlements ought to be treated as instances of sphere sovereignty.

This chapter will consider the matter of internal powers of religious institutions through examples from the United States, Germany (including the impact of the European Convention and judgments of the European Court of Human Rights) and South Africa.

<sup>3</sup> See JD van der Vyver, *Leuven Lectures on Religious Institutions, Religious Communities and Rights* (Leuven, Peeters, 2004) 72.

<sup>4</sup> *ibid.*, 77.

<sup>5</sup> *ibid.*, 72 (defining the concept of institutional group rights as rights vesting 'in a social institution as such and [which] can only be exercised by the collective entity through the agency of its internal representative organs'); and as to the concept of group rights in general, see JD van der Vyver, 'Constitutional Options for Post-Apartheid South Africa' (1991) 40 *Emory Law Journal* 745, 825–28.

<sup>6</sup> Van der Vyver (above n 3) at 43–45; and see also JD van der Vyver, 'Sphere Sovereignty of Religious Institutions: A Contemporary Calvinistic Theory of Church-State Relations' in Gerhard Robbers (ed), *Church Autonomy: A Contemporary Survey* 645, 656 (Frankfurt aM, Peter Lang, 2001); van der Vyver, 'The Jurisprudential Legacy of Abraham Kuyper and Leo XIII' in (2002) 5 *Markets & Morality* 211, 220–21; van der Vyver, 'Book Review: Culture and Equality: An Egalitarian Critique of Multiculturalism by Brian Barry' (2002) 17 *Connecticut Journal of International Law* 323, 329–30.

<sup>7</sup> Van der Vyver, *Leuven Lectures*, above n 3 at 32–33, 41–43; van der Vyver, 'The Jurisprudential Legacy of Abraham Kuyper and Leo XIII', n 6 above at 217–18.

## II. INTERNAL POWERS OF RELIGIOUS INSTITUTIONS

### A. The United States

The Supreme Court of the United States has from the beginning displayed reluctance to interfere in the internal affairs of religious institutions. In *Watson v Jones* (1872), the Court adjudicated a dispute between pro- and anti-slavery factions over the control of the Walnut Street Presbyterian Church in Louisville, Kentucky. The General Assembly of the Presbyterian Church recognised the anti-slavery faction's claim, and the Court, basing its opinion on a 'broad and sound view of the relations of church and state under our system of laws', proclaimed that

whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them.<sup>8</sup>

It was later decided that the opinion in *Watson*

radiated . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.<sup>9</sup>

#### (i) *The Ministerial Exception*

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, colour, religion, sex, and national origin in employment practices.<sup>10</sup> Section 702 of the Act exempts religious corporations, associations, educational institutions and societies from the equal employment opportunity provisions of the Act<sup>11</sup> with respect to the employment of persons of a particular religion to perform work connected with the carrying on by the corporation, association, educational institution or society of its activities. Exemption from the non-discrimination provisions of the Civil Rights Act was seemingly confined to *the employment* of persons of a particular religion in religiously defined institutions. Labour relations in a broader sense seemingly did not come within the confines of this exception.

However, federal courts have consistently upheld a 'ministerial exception', which finds its roots in the holding of the 1972 Fifth Circuit case of *McClure v Salvation Army*<sup>12</sup> that 'Congress did not intend, through the non-specific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister'.<sup>13</sup> The First Circuit subsequently confirmed that adjudicating a wrongful termination action against a not-for-profit religious corporation 'plunges an inquisitor

<sup>8</sup> *Watson v Jones*, 80 US 679, 727 (1871) (United States).

<sup>9</sup> *Kedroff v Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 244 US 94, 116 (1952) (United States).

<sup>10</sup> Civil Rights Act of 1964, USC sec 2000e et seq.

<sup>11</sup> *ibid.*

<sup>12</sup> *McClure v Salvation Army*, 460 F 2d 553 (5th Cir 1972) (United States).

<sup>13</sup> *ibid.*, 560–61.

into a maelstrom of Church policy, administration, and governance' in violation of the Free Exercise and the Establishment Clauses of the First Amendment.<sup>14</sup>

In *Hosanna-Tabor Evangelical Lutheran Church and School v EEOC* the US Supreme Court confirmed that the Establishment and Free Exercise Clauses of the First Amendment operate to bar suits brought on behalf of ministers of a church who claim that termination of their employment by the church violated employment discrimination laws, holding that '[s]uch action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs'.<sup>15</sup>

The case emanated from the dismissal of a fourth-grade teacher, Cheryl Perich, by school authorities of the Hosanna-Tabor Evangelical Lutheran Church and School. Ms Perich had been specially trained for the position of, and 'called' by the Church congregation as, a 'Minister of Religion Commissioned'. Diagnosed with a medical condition that seriously affected her teaching, Ms Perich was granted disability leave. Ms Perich's attempt to return to her post before the end of the period agreed upon resulted in a dispute with school authorities, who first offered her a 'peaceful release' from her call, and then, when she refused to accept the offer and instead threatened to take legal action, responded by terminating her employment. In the ensuing litigation, Ms Perich claimed that her termination violated the Americans with Disabilities Act of 1990.<sup>16</sup> The school authorities claimed that their decision to terminate Ms Perich's employment was based on her disruptive and insubordinate behaviour and the fact that she threatened to sue the Church in violation of the synod's belief that Christians should resolve their differences by internal means.

The District Court granted judgment in favour of Hosanna-Tabor on basis of the 'ministerial exception', noting that the facts surrounding Ms Perich's 'employment in a secular school with a sectarian mission' supported her characterisation as a ministerial employee.<sup>17</sup> The Court of Appeals for the Sixth Circuit, however, held that the ministerial exception is confined to employees whose 'primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious rituals and worship';<sup>18</sup> and since Ms Perich like all teachers at Hosanna-Tabor primarily taught secular subjects, the Court decided that she did not

<sup>14</sup> *Natal v Christian and Missionary Alliance*, 878 F 2d 1575, 1578 (1st Cir 1989) (United States); and see also *Scharon v St Luke's Episcopal Presbyterian Hospitals*, 929 F 2d 360, 362–63 (8th Cir 1991) (United States); *Equal Employment Opportunity Commission v Catholic University*, 83 F 3d 455, 460–63 (DC Cir 1996) (United States); *Combs v Central Texas Annual United Methodist Conference*, 173 F 3d 343, 345–50 (5th Cir 1999) (United States); *Equal Employment Opportunity Commission v Roman Catholic Diocese of Raleigh, Inc.*, 213 F 3d 795, 800–801 (4th Cir 2000) (United States); *Gellington v Christian Methodist Episcopal Church*, 203 F 3d 1299, 1301–4 (11th Cir 2000) (United States); *Bryce v Episcopal Church in Diocese of Colorado*, 289 F3d 648, 655–57 (10th Cir 2002) (United States); *Werft v Desert Southwest Annual Conference*, 377 F 3d 1099, 1100–104 (9th Cir 2004) (United States); *Petruska v Gannon University*, 462 F 3d 294, 303–7 (3rd Cir 2006) (United States); *Hollins v Methodist Healthcare, Inc.*, 474 F 3d 223, 225–27 (6th Cir 2007) (United States); *Rweyemamu v Cote*, 520 F 3d 198, 204–209 (2nd Cir 2008) (United States); *Schleicher v Salvation Army*, 518 F 3d 472, 475 (7th Cir 2008) (United States).

<sup>15</sup> *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*, 132 S Ct 694, 707; 565 US \_\_\_\_ (2012).

<sup>16</sup> Pub L 101–336, 104 Stat 327, enacted July 26, 1990, codified at 42 USC sec 12101.

<sup>17</sup> *EEOC v Hosanna-Tabor Lutheran Church*, 582 F Supp 2d 881, 891–92 (ED Mich 2008) (United States).

<sup>18</sup> *Rayburn v General Conference of Seventh-day Adventists*, 772 F 2d 1164, 1169 (1985) (United States); see also *EEOC v Catholic University* 83 F 3d 455, 461 (DC Cir 1996) (United States); *Hollins* (above n 14) 474 F 3d 223, 226 (United States).

qualify as a 'minister' for purposes of the ministerial exception.<sup>19</sup> The matter went before the US Supreme Court.<sup>20</sup>

The ministerial exception is based on two requirements: (a) the employer must be a religious institution, and (b) the employee must be a ministerial employee.<sup>21</sup> A 'religious institution' is 'a religiously affiliated entity with substantial religious character', or one that 'is marked by clear and obvious religious characteristics',<sup>22</sup> including religiously affiliated schools, corporations and hospitals.<sup>23</sup> The exception will be invoked whenever 'the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious rituals or worship'.<sup>24</sup>

Having confirmed that the ministerial exception is not limited to the head of a religious congregation, the Supreme Court had no difficulty deciding that the exception was applicable to Ms Perich.<sup>25</sup> As a 'Minister of Religion Commissioned' she was required to perform her obligations 'according to the Word of God and the confessional standards of the Evangelical Lutheran Church as drawn from the Sacred Scriptures'.<sup>26</sup> And, in the final analysis: 'The Church must be free to choose who will guide it on its way'.<sup>27</sup>

## (ii) Sphere Sovereignty in a Broader Context

In a 1987 case testing Section 702 of the Civil Rights Act of 1964 against the First Amendment prohibition of the establishment of religion, Justice William J Brennan endorsed the internal sovereignty of the Church:

Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them is . . . a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers religious freedom as well.<sup>28</sup>

The case of *Kedroff v St Nicholas Cathedral* is quite telling in this regard.<sup>29</sup> In consequence of strong anti-Soviet sentiments that prevailed in the United States at the time, New York State in 1945 (with clarifying amendments added in 1948) passed legislation with a view to transferring the control of the New York Russian Orthodox Cathedral from the central Patriarchate in Moscow to the governing authorities of the Church in

<sup>19</sup> *EEOC v Hosanna-Tabor Lutheran Church and School*, 597 F 3d 769, 778–81 (6th Cir 2010) (United States), reversed 132 S Ct 694, 707 (2012) (see n 15 above).

<sup>20</sup> *Hosanna-Tabor Evangelical Lutheran Church and School v EEOC*, 132 S Ct 694, 563 US \_\_\_\_ (2011) (United States).

<sup>21</sup> *Hollins* (above n 14) 474 F 3d 223, 225.

<sup>22</sup> *Shaliehsabou v Hebrew Home of Washington*, 363 F 3d 299, 310 (4th Cir 2004) (United States); and see also *Hollins* (above n 14) 473 F 3d 223, 225–26.

<sup>23</sup> *Shaliehsabou* (above n 22) 363 F 3d 299, 309–10; see also *Hollins* (above n 14) 474 F 3d 223, 225.

<sup>24</sup> *Rayburn* (above n 18) 772 F 2d 1164, 1168; see also *Hollins* (above n 14) 473 F 3d 223, 226.

<sup>25</sup> *Hosanna-Tabor*, 132 S Ct 694, 707 (2012).

<sup>26</sup> *ibid*, 16.

<sup>27</sup> *ibid*, 22.

<sup>28</sup> *Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v Amos*, 483 US 327, 342 (1987) (United States), Brennan J (concurring).

<sup>29</sup> *Kedroff v Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 244 US 94, 116 (1952) (United States).

America.<sup>30</sup> A group of parishioners wanting the control to return to the Moscow Patriarchate challenged the competence of the Archbishop of New York to occupy the Church property. The matter was decided in favour of the Moscow Patriarchate, the US Supreme Court holding that the New York law violated the constitutional right to 'the free exercise of an ecclesiastical right, the Church's choice of its hierarchy'.

*Kedroff* is quite unique in American jurisprudence in that it recognised an organised religious institution as the repository of a constitutional right: freedom of religion. American courts had always proceeded on the assumption that the freedoms guaranteed by the Bill of Rights vest in individuals (natural persons) only. *Kedroff* came close to deviating from that assumption. *Kedroff* also calls attention to the concept of group rights.

Several American scholars have ventured to interpret judgments of American courts relating to law and religion issues on basis of the Calvinistic doctrine of sphere sovereignty. This includes the commendable work of Paul Horwitz of the University of Alabama, who sought guidance from the Neo-Calvinistic doctrine of sphere sovereignty, as enunciated by the Dutch political philosopher Abraham Kuyper (1837–1920), to overcome some of the difficulties attending establishment jurisprudence in the United States. Looking beyond the legal norms that may or may not be enacted by Congress under the constraints imposed by the Constitution to uncover the role of institutions functioning within the protected enclave of the First Amendment, such as universities, the press, and religious associations,<sup>31</sup> Horwitz argued convincingly that such 'First Amendment institutions' should be afforded the right to operate on a largely self-regulating basis and beyond the supervision of external legal regimes.<sup>32</sup>

The Horwitz approach seeks to extend the domain of sphere sovereignty well beyond the hiring and firing policies and practices of religious institutions. American courts remain open to extending sphere sovereignty concerns beyond the confines of a ministerial exception. The language chosen by the courts to legitimise the exception are quite often couched in fairly general terms, and in *Hosanna-Tabor*, the Court expressly confined its judgment to the facts in the case, expressing 'no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers'.<sup>33</sup> It cited with approval a passage from *Serbian Eastern Orthodox Diocese for United States and Canada v Milivojevic*, in which the US Supreme Court condemned a State supreme court for 'inquiring into whether the Church had followed its own procedures' when it removed the defendant from the office of Bishop, proclaiming that the court had thereby 'unconstitutionally undertaken the resolution of quintessentially religious controversies . . . [committed] exclusively to the highest ecclesiastical tribunal'.<sup>34</sup>

<sup>30</sup> New York, 'Religious Corporation' Law, 302 NY 24, 96 NE 2d 68.

<sup>31</sup> Paul Horwitz, 'Universities as First Amendment Institutions: Some Easy Answers and Hard Questions' (2007) 54 *UCLA Law Review* 1497; Paul Horwitz, 'Churches as First Amendment Institutions: Of Sovereignty and Spheres' (2009) 35 *Harvard Civil Rights–Civil Liberties Law Review* 79.

<sup>32</sup> See also Lael Daniel Weinberger, 'The Business Judgment Rule and Sphere Sovereignty' (2010) 27 *Thomas M Cooley Law Review* 279.

<sup>33</sup> *Hosanna-Tabor*, 132 S Ct 694; 565 US \_\_\_\_ (2012).

<sup>34</sup> *ibid*, 12, with reference to *Serbian Eastern Orthodox Diocese for United States and Canada v Milivojevic*, 426 US 696, 720 (1976) (United States).

## B. Germany

In a 2011 German labour court case involving the medical superintendent at a Catholic hospital who divorced his wife and remarried, the Church maintained that the doctor's employment contract required him to accept and to uphold the basic principles embodied in the religious and moral doctrines of the Church. The Labour Court recognised the 'obligation of loyalty' of the applicant toward basic doctrines and practices of his employer and decided that the doctor's dismissal would only be justified if, upon balancing the conflicting interests of both parties to the dispute, violation of the loyalty commitment that went with his office and implied by the Catholic verdict pronouncing his second marriage to be null and void was found to carry sufficient weight ('[hat] ein hinreichend schweres Gewicht'). The Labour Court decided that the dismissal of the doctor was unjustified and upheld the applicant's complaint.

The Court's decision here clearly contradicted the internal sphere sovereignty of churches, which for many years constituted a basic principle of German constitutional law. However, it was also quite obvious that the decision was informed by three recent judgments of the European Court of Human Rights (ECtHR) relating to the dismissal of church employees for conduct considered by the respective churches as violations of the fundamental tenets of the churches concerned.

### (i) Self-determination/Autonomy/Sphere Sovereignty of Churches

The status of churches and other religious institutions in Germany is governed by the Church Clauses (*die Kirchenartikel*) in the Weimar Constitution of 11 August 1919,<sup>35</sup> which were incorporated into the German Constitution by Article 140 of the *Grundgesetz für die Bundesrepublik Deutschland* of 1949.<sup>36</sup> Article 137(3) of the Weimar Constitution provides as follows:

Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all. They shall confer their offices without the participation of the state or the civil community.<sup>37</sup>

Its details were specified in a judgment of the Bundesverfassungsgericht of 1985<sup>38</sup> in an appeal against two decisions of the German Federal Labour Court relating to (a) the dismissal of a medical doctor in a Catholic hospital in Essen,<sup>39</sup> and (b) the dismissal of an accountant at a Catholic youth hostel in Munich.<sup>40</sup> The doctor was dismissed because he publicly testified to his personal view on abortions (which was in conflict with official church policy on the matter), and the accountant because he defected from the Catholic Church.

<sup>35</sup> *Die Verfassung des Deutschen Rechts*, arts 137–141 (1919) (hereafter 'Weimar Constitution').

<sup>36</sup> *Grundgesetz für die Bundesrepublik Deutschland*, art 140 (entered into force on May 23, 1949) (incorporating the provisions of arts 136–139 and 140 into the *Grundgesetz*).

<sup>37</sup> Weimar Constitution, art 137(3): 'Jede Religionsgesellschaft ordnet und verwaltet ihre Angelegenheiten selbständig innerhalb der Schranken des für alle geltenden Gesetzes. Sie verleiht ihre Ämter ohne Mittwirkung des Staates oder der bürgerlichen Gemeinschaft'.

<sup>38</sup> BVerfGE 70, 138 – *Loyalitätspflicht* (4 June 1985) (Germany).

<sup>39</sup> 2 AZR 591/80 and 2 AZR 628/80 (21 October 1982) (Germany).

<sup>40</sup> 7 AZR 249/81 (23 March 1984) (Germany).



The Bundesverfassungsgericht decided that the provisions of Article 137(3) of the Weimar Constitution do not only apply to churches and their independent components, but also to other institutions, irrespective of their legal construction, which in view of their purpose and disposition, are self-evidently, according to perceptions of the church, associated with the church in a certain way and which can be required to undertake and to execute a component of the church's calling.<sup>41</sup> The constitutional guarantee of 'the right to self-determination' remains of vital importance for purposes of specifying these labour relations, and includes the competence of churches to require of their employees to uphold the prevailing principles included in the religious and ethical doctrines of the church.<sup>42</sup> Employees of churches are accordingly bound to uphold 'loyalty commitments' (*Loyalitätsobliegenheiten*) toward the church and the principles it stands for.<sup>43</sup>

Churches, like all other persons, must execute their freedom of contract subject to the labour laws of the state.<sup>44</sup> This does not mean, however, that the labour law of the state will necessarily in all instances trump the right to self-determination of a church.<sup>45</sup> It is therefore necessary to strike a balance between the conflicting interests inherent in obligatory labour practices and the demands of ecclesiastical autonomy, and in this process a special premium is to be placed on the personal image or self-esteem of churches (*Selbstverständnis der Kirchen*):<sup>46</sup>

It after all remains constitutional to leave it up to a church itself to take binding decisions as to what 'the credibility of the Church and the advocacy thereof' requires, what constitutes 'specific ecclesiastical matters', what the 'closeness' of such matters entails, what is included in the 'essential principles of faith-related and ethical doctrine', and what should be regarded as – at times, serious – violations.<sup>47</sup>

## (ii) *Judgments of the ECtHR*

On 23 September 2010, the ECtHR handed down judgments in two distinct cases based on similar facts but in respect of which the ECtHR came to completely opposite conclusions. The applicants in both cases were employees of church institutions and were dismissed, again in both instances, because they were involved in extramarital relations.<sup>48</sup> The complaint against their dismissal was essentially based on Article 8 of the European

<sup>41</sup> BVerfGE 70, 138 (above n 48), at para B.II.1a): 'Diese Selbstordnungs- und Selbstverwaltungsgarantie kommt nicht nur den verfaßten Kirchen und deren rechtlich selbständigen Teilen zugute, sondern allen der Kirche in bestimmter Weise zugeordneten Einrichtungen ohne Rücksicht auf ihre Rechtsform, wenn sie nach kirchlichem Selbstverständnis ihrem Zweck oder ihrer Aufgabe entsprechend berufen sind, ein Stück des Auftrags der Kirche wahrzunehmen und zu erfüllen'.

<sup>42</sup> *ibid*, para B.II.1c)–d): 'Die Verfassungsgarantie des Selbstbestimmungsrechts bleibt für die Gestaltung dieser Arbeitsverhältnisse wesentlich . . . Dazu gehört weiter die Befugnis der Kirche, den ihr angehörenden Arbeitnehmern die Beachtung jedenfalls der tragenden Grundsätze der kirchlichen Glaubens- und Sittenlehre aufzuerlegen'.

<sup>43</sup> See, for example, *ibid*, para A.I.1 and A.2.

<sup>44</sup> *ibid*, para B.II.1e).

<sup>45</sup> *ibid*.

<sup>46</sup> *ibid*: 'Dabei ist dem Selbstverständnis der Kirchen ein besonderes Gewicht beizumessen'.

<sup>47</sup> *ibid*, para B.II.2a): 'Es bleibt danach grundsätzlich den verfaßten Kirchen überlassen, verbindlich zu bestimmen, was 'die Glaubwürdigkeit der Kirche und ihrer Verkündigung erfordert', was 'spezifisch kirchliche Aufgaben' sind, was 'Nähe' zu ihnen bedeutet, welches die 'wesentlichen Grundsätze der Glaubens – und Sittenlehre' sind und was als – gegebenenfalls schwerer – Verstoß gegen diese anzusehen ist'.

<sup>48</sup> *Obst v Germany* (App No 425/03), 23 September 2010 (ECtHR); *Schüth v Germany* (App No 1620/03), 23 September 2010 (2011) 52 EHRR 32 (ECtHR).



Convention for the Protection of Human Rights and Fundamental Freedoms, which protects the right of everyone 'to respect for his private and family life, his home and his correspondence'.<sup>49</sup>

The dismissal of Michael Heinz Obst, Director for Europe in the Department of Public Relations of The Church of Jesus Christ of Latter-day Saints (the Mormon Church), was upheld by the ECtHR on the basis that the labour courts of Germany, in reviewing the legality of his dismissal, adequately considered the impact of the applicant's discharge on his personal and family life.<sup>50</sup> The ECtHR noted that the effect on the personal and family life of the applicant would be minimal, given the fact that Mr Obst was still relatively young and should be able to find alternative employment without too much hassle.<sup>51</sup> The ECtHR also noted that Mr Obst, upon accepting the position of Director for Europe was, or should have been, aware of the special premium placed by the Mormon Church on marital fidelity.<sup>52</sup> His dismissal by the Mormon Church could therefore not be faulted.

In the case of Bernhard Josef Schüth, organist and choir master of the Catholic congregation of St Lambert in Essen, Germany, the ECtHR came to the opposite conclusion. The marriage of Mr Schüth had broken down in 1995; he subsequently lived with another woman in an extramarital relationship, and at the time of his dismissal by the Church, that other woman was expecting his child. The ECtHR paid special attention to the question whether or not the labour courts of Germany considered the impact of his dismissal on his personal and family life, and noted that the legal protection afforded to the rights of the applicant by the European Convention was never mentioned in proceedings before the labour courts.<sup>53</sup> The labour courts consequently failed to strike a balance between the interests of the Catholic Church and the rights of the applicant.<sup>54</sup> The signature of Mr Schüth on his contract of employment could not be interpreted as an indisputable undertaking to lead a life of abstinence following the breakup of his marriage or in the event of a divorce.<sup>55</sup> The fact that the applicant would only have limited opportunities to find alternative employment received special emphasis in the opinion of the ECtHR (at the time, Mr Schüth had a temporary job at a protestant congregation).<sup>56</sup> Since the labour court neglected to strike a balance between the rights of the applicant in respect of his private and family life and the interests of the Church, the ECtHR decided that respect for the private and family life of Mr Schüth, as protected by Article 8 of the European Convention, had been violated. His discharge consequently constituted a violation of the European Convention.

More recently, in *Siebenhaar v Germany*, the ECtHR reiterated the principles outlined in *Obst* and *Schüth*.<sup>57</sup> In this instance, though, the applicant's rights in contention were based on the freedom of thought, conscience and religion guaranteed by Article 9 of the European Convention. Astrid Siebenhaar was employed by a day-care centre of a

<sup>49</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, art 8, 213 UNTS 222, entered into force on 3 September 1953 (hereafter 'European Convention').

<sup>50</sup> *Obst* (n 48 above) at para 49.

<sup>51</sup> *ibid*, at para 48.

<sup>52</sup> *ibid*, at para 50.

<sup>53</sup> *Schüth* (n 48 above) at para 67.

<sup>54</sup> *ibid* at para 74.

<sup>55</sup> *ibid* at para 71.

<sup>56</sup> *ibid* at para 73.

<sup>57</sup> *Siebenhaar v Allmagne* (App no 18136/02), 3 February 2011 (ECtHR).

congregation in Pforzheim of the Evangelical (Lutheran) Church, and she was discharged by Church authorities when they were alerted to the fact that she was a member of the Universal Church of Humanism and in fact also conducted primary education classes within that religious sect. The ECtHR, following the same reasoning as in *Obst*, decided that her dismissal did not amount to a violation of the freedom of religion provisions of the European Convention.

It must be emphasised that the ECtHR does not have jurisdiction over the Mormon Church, the Roman Catholic Church, or the Lutheran Church. It can only adjudicate compliance by High Contracting Parties (Member States of the Council of Europe) with their obligations under the European Convention.

However, the ECtHR has developed the 'doctrine of positive obligation', based on Article 1 of the European Convention, which provides: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in . . . this Convention'.<sup>58</sup> In virtue of this provision, High Contracting Parties are not only obliged to refrain from human rights violations through state action, they must also put laws and procedures in place that will protect the rights and freedoms of persons under their jurisdiction against infringement by non-state perpetrators.<sup>59</sup> In *Obst*, the ECtHR referred to the principle of positive obligation as 'the adoption of measures aimed at respect for the private life, even in mutual relations between individuals',<sup>60</sup> and it added that

it is required of the State, as a component of its positive obligation under Article 8, to recognize the complainant's right to respect for his private and family life as against measures enforced by the Mormon Church for his dismissal.<sup>61</sup>

Germany complied with its positive obligation by establishing labour courts and by making provision for the review of judgments of those courts by the Federal Constitutional Court (das Bundesverfassungsgericht),<sup>62</sup> and further by affording to the applicant the opportunity to take his case to a labour court in order to contest the legality of his dismissal in view of the rights associated with his ecclesiastical duties and by balancing his competing interests up against those of the Church.<sup>63</sup> In *Obst*, the ECtHR decided that Germany, through its labour courts, complied with its positive obligation by taking into account the right of the applicant to his private and family life and violation thereof by the Mormon Church; and in *Siebenhaar*, the ECtHR came to a similar conclusion, holding that the German labour courts adequately considered the effect of the applicant's dismissal in relation to her freedom of religion.

<sup>58</sup> European Convention, art 1.

<sup>59</sup> See, for example, *HLR v France* (App no 24573/94), 29 April 1997, para 40 (ECtHR); *A v The United Kingdom* (App no 25599/94), 23 September 1998, para 22 (ECtHR). Many years ago, an American court also seemed to subscribe to the same idea by proclaiming: 'Denying includes inaction as well as action . . . the omission to protect, as well as the omission to pass laws for protection'. *United States v Hall*, 26 F Cas 79, 81 (CCSD Ala 1871) (United States). However, the principle of state action was the one that prevailed in the United States.

<sup>60</sup> *Obst* (n 48 above) at para 41; ('l'adoption de mesures visant au respect de la vie privée jusque dans les relations des individus entre eux'); and see also *Schüth* (n 48 above) at para 55; *Siebenhaar* (n 57 above) at para 38.

<sup>61</sup> *Obst* (n 48 above) at para 43 ('l'Etat était tenu, dans le cadre de ses obligations positives découlant de l'article 8, de reconnaître au requérant le droit au respect de sa vie privée contre la mesure de licenciement prononcée par l'Eglise mormone'); and see also *Schüth* (n 48 above) at para 57; *Siebenhaar* (n 57 above) at para 40.

<sup>62</sup> *Obst* (n 48 above) at para 45; *Schüth* (n 48 above) at para 59; *Siebenhaar* (n 57 above) at para 42.

<sup>63</sup> *ibid.*

In *Schüth*, the ECtHR came to the opposite conclusion: The labour court did not balance the entire scope of the conflicting interests that were in issue. It made no mention of the family life of the applicant,<sup>64</sup> and

the interests of the ecclesiastical employer was not weighed up against the right of the applicant to respect for his private and family life as guaranteed by Article 8 of the European Convention, but [the labour court] only considered his interests of remaining in the employ of the Church.<sup>65</sup>

Therefore, the protection afforded to him did not comply with the positive obligation of Germany as a High Contracting Party to the European Convention.

The question that had to be decided by the ECtHR was therefore not primarily whether the Mormon or Catholic or Lutheran Churches violated the Convention provisions relating to the right of everyone to respect for their private and family life,<sup>66</sup> or with a view to freedom of religion,<sup>67</sup> but whether Germany adequately secured that right and freedom from infringement by the churches concerned. Proceedings in the German labour courts, and not the discriminatory practices of the concerned churches, were therefore in issue.

(iii) *Impact of the European Convention on the Internal Sphere Sovereignty of Churches*

The human rights decrees of the European Convention reach far into the domestic enclave of private (non-state) institutions. Member States of the Council of Europe must secure the rights and freedoms enunciated in the Convention against infringements by the state, but also on the horizontal front of person-to-person relations. The German state does so in labour relations through the agency of its labour courts. The labour courts must ensure that the concerned rights and freedoms are not violated through labour-related decisions and action. The judgments of the ECtHR in *Obst*, *Schüth*, and *Siebenhaar* added a particular dimension to the principles which Germany is required to demand of its labour courts: the effects of dismissal of an employee, for whatever reason, on the personal and family life, or on religious freedom, of the employee. This particular constraint on the constitutional right of church institutions to require loyalty of their workers with regard to the principles and practices upheld by the church as part of its confession of faith seems to place a special burden on the 'right to self-determination' of religious institutions. It might happen that church institutions are constrained, in view of human rights standards deriving from the European Convention, to put up with the services of someone who commits marital infidelity (*Obst* and *Schüth*), who turns out to be an active member of a sect whose beliefs and practices are at odds with those of the employer church (*Siebenhaar*), who publicly contradicts established dogma of the church (2 AZR 591/80 and 2 AZR 628/80), or who terminates his or her membership of the church (7 AZR 249/81).

On the other hand, though, labour courts are only required to *take account of* the effect of the dismissal of an employee on his or her personal and family life, or on his or her freedom of religion, and to ask themselves whether the consequences of the

<sup>64</sup> *Schüth* (n 57 above) at para 67.

<sup>65</sup> *ibid.* ('Les intérêts de l'Eglise employeur n'ont ainsi pas été mis en balance avec le droit du requérant au respect de sa vie privée et familiale, garanti par l'article 8 de la Convention, mais uniquement avec son intérêt d'être maintenu dans son emploi'.)

<sup>66</sup> European Convention, art 8.

<sup>67</sup> *ibid.*, art 9.

employee's conduct with regard to the spiritual calling of the church were really of such a nature as to justify the negative effects his or her dismissal would have on his or her personal and family life or religious freedom. It might turn out that the game was after all not worth the candle.

The recent decision of the German labour court in the case of the medical superintendent who divorced his wife and re-married perhaps reflected excessive sensitivity of the labour court to the judgments of the ECtHR. German labour courts have now been informed of their obligation to find an appropriate balance between the protected rights of church employees under threat of dismissal, against their expected loyalty towards the internal doctrinal and morally-based predilections of the concerned religious institution. Whereas in the United States great emphasis is placed on the internal sphere sovereignty of religious institutions, Germany, as a Member State of the Council of Europe, must ensure adequate protection for the basic rights and freedoms enunciated in the European Convention against infringements by state and non-state perpetrators in all walks of life. This includes internal labour relations within the enclave of religious institutions in respect of which Germany, through its labour courts, must strike a balance between the obligation of loyalty of an employee toward the spiritual doctrine and ecclesiastical practices of the religious institution concerned on the one hand, and protection of the rights and freedoms guaranteed by the European Convention on the other.

### C. South Africa

Discrimination based on sexual orientation by a church institution was in issue in the case of *Strydom v Dutch Reformed Congregation, Moreleta Park*, decided by the Equality Court, Transvaal Provincial Division on 27 August 2006.<sup>68</sup>

The Moreleta Park congregation employed Johan Daniel Strydom as a music instructor (organ teacher) in its Arts Academy. Church authorities fired him because he became involved in a same-sex relationship. Mr Strydom challenged his dismissal before the Equality Court and was awarded compensation in the amount of R75,000 for pain and suffering and a further R11,000 for loss of income.

The Equality Court based its decision mainly on the facts that Mr Strydom (a) served as an independent contractor,<sup>69</sup> (b) was in no way involved in the spiritual activities of the Church, and (c) was not even a member of the particular Dutch Reformed Church which brought suit in the matter.<sup>70</sup> The Equality Court made it abundantly clear that it would not have ruled against the Church if Mr Strydom's contractual obligations had included functions that were part of the spiritual mission of the Church. It referred in this regard to the exposition by a leading analyst of the religion clauses in the South

<sup>68</sup> *Strydom v Dutch Reformed Congregation, Moreleta Park* (2009) (4) SA 510 (South Africa).

<sup>69</sup> In South African labour law a distinction is made between an employee (someone who works for an employer and executes his or her contractual obligations under the constant command and control of the employer) and an independent contractor (someone who is hired to produce a certain service or deliver an end product without being under the command and control of the employer as to the manner in which he or she executes the contractual obligation).

<sup>70</sup> The churches denoted in English as Dutch Reformed actually comprise three quite distinct denominations (two distinct words in the Afrikaans language that are used to distinguish the three churches – '*Gereformeerde*' and '*Hervormde*' – can only be translated in English as 'Reformed'). The plaintiff in this case was a congregation of the '*Nederduitse Gereformeerde Kerk*' and Mr Strydom was a member of the '*Nederduitsch Hervormde Kerk*'.

African Constitution, Paul Farlam, of instances where the state ought not to interfere in the internal affairs of religious institutions:

Few exercises are more central to religious freedom than the right of a church to choose its own spiritual leaders. If a court were to hold that churches could not deem sexual orientation, or any of the other enumerated ground in the equality clause, a disqualifying factor for the priesthood, the effect on many churches could be devastating. Consequently, although the value of equality is foundational to the new constitutional dispensation, it is unlikely that equality considerations could outweigh the enormous impact of failing to give churches an exemption in relation to their spiritual leaders.<sup>71</sup>

The substance of this citation reflects the spirit thus far maintained in practices and court judgments dealing with domestic affairs of religious institutions.

(i) *Equality Concerns*

Equal protection and the proscription of discrimination are without doubt the most basic norm – *die Grundnorm* – of the South African constitutional designation that ‘equality, together with dignity and freedom, lie at the heart of the Constitution’.<sup>72</sup> The Constitution accordingly prohibits unfair discrimination, directly or indirectly, by the state and by other persons based on ‘race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth’, or on other similar grounds.<sup>73</sup>

The constitutional proscription of unfair discrimination in South Africa is quite unique in two special respects: (a) sexual orientation is included as one of the grounds that would render differentiations for legal purposes a matter of unfair discrimination (unless it can be proven that the differentiation ‘is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’<sup>74</sup>); and (b) the Constitution also makes provision for the proscription of discrimination by persons and institutions other than the state. To this latter end, the Promotion of Equality and Prevention of Unfair Discrimination Act was enacted in 2000.<sup>75</sup> The Act singled out unfair discrimination based on race, gender, and disability for special scrutiny, but applies broadly to discrimination by the state and by non-state perpetrators.

In terms of the Act, discrimination based on gender includes ‘any . . . religious practice, which impairs the dignity of women and undermines equality between women and men’.<sup>76</sup> This provision clearly implicates the exclusion of women from ecclesiastical offices. Since gender is included in the list of grounds that *prima facie* render differentiations for legal purposes to be a matter of unfair discrimination,<sup>77</sup> the burden of proof

<sup>71</sup> *Strydom* (2009) (4) SA 510, at para 15, with reference to Paul Farlam, ‘Freedom of Religion, Belief and Opinion’ in Stuart Woolman, Theunis Roux and Michael Bishop (eds), *Constitutional Law of South Africa*, vol 3, 2nd edn Revised Service (Cape Town, Juta, 2009) chs 41, 47.

<sup>72</sup> *Benguwenya Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd*, Case No CCT 39/10 [2010] ZACC 26 930 (November 2010) (South Africa).

<sup>73</sup> South African Constitution s 9(3) and (4); and see also the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (n 72 above), s 1(xxii) ‘prohibited grounds’ para (a).

<sup>74</sup> South African Constitution s 36(1).

<sup>75</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000 was enacted under South African Constitution, s 9(4).

<sup>76</sup> *ibid*, at s 8.

<sup>77</sup> *ibid*, at s 1(xxii).

would be on a church institution to show that exclusion of women from ecclesiastical offices is in fact not 'unfair'.<sup>78</sup> The Act contains a long list of circumstances that may be considered in this regard, for example 'whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned',<sup>79</sup> 'the impact or likely impact of the discrimination on the complainant',<sup>80</sup> and 'whether the discrimination has a legitimate purpose'.<sup>81</sup> It does not seem as though these considerations would contribute to alleviate the burden of proof resting on a church institution in any way.

Imposing the constitutional proscription of unfair discrimination on, for example, religious institutions, was in a sense unfortunate. Many mainstream churches still uphold age-old practices that amount to gender discrimination against women, and does one really want to entrust the state with the power and obligation to compel the Roman Catholic Church, the Greek Orthodox Church, or Jewish religious institutions, to ordain women as part of their clergy? Surely, that would amount to political totalitarianism, which 'becomes evident when State authority extends into the private enclave of non-State societal circles, such as family life, academic institutions and the sovereign sphere of the churches'.<sup>82</sup>

#### *(ii) Implementation of the Equality Directive – Sphere Sovereignty*

In spite of the Act of 2000, South African authorities have remained particularly sensitive to the internal sphere sovereignty of religious institutions, as exemplified by the obiter dictum in *Strydom*.

For example, public benefit activities that are exempt from income tax include 'the promotion or practice of religion which encompasses acts of worship, witness, teaching and community service based on a belief in a deity', as well as 'the promotion and/or practice of a belief', and 'the promotion of, or engaging in, philosophical activities'.<sup>83</sup> There are many racially exclusive churches in South Africa,<sup>84</sup> but, to the best of my knowledge, no one of those has been denied tax exemptions.

The law that was enacted in 2006 to afford legal sanction to same-sex marriages (referred to in the Act as 'civil unions') contains a provision that affords the right to marriage officers to inform the Minister of Home Affairs that they object on grounds of conscience, religion and belief to solemnising a civil union between persons of the same sex, whereupon the marriage officer cannot be compelled to solemnise such civil unions.<sup>85</sup>

<sup>78</sup> *ibid.*, at s 13(2)(b)(ii).

<sup>79</sup> *ibid.*, at s 14(2)(c).

<sup>80</sup> *ibid.*, at s 14(3)(b).

<sup>81</sup> *ibid.*, at s 14(3)(f).

<sup>82</sup> JD van der Vyver, 'The Function of Legislation as an Instrument of Social Reform' (1976) 93 *South African Law Journal* 56, 66; and see also van der Vyver, 'Gelykberegtiging' (1998) 61 *Journal of Contemporary Roman-Dutch Law* 367, 395.

<sup>83</sup> Income Tax Act 58 of 1962, Ninth Schedule, Pt I, para 5.

<sup>84</sup> Leaving aside adherents to Traditional African Religions and the many Independent Christian Churches in the African community (of which there are about 7000 varieties in South Africa), mention can be made of the *Afrikaanse Protestantse Kerk* (Afrikaans Protestant Church) which expressly reserves membership of the Church to whites only.

<sup>85</sup> Civil Union Act 17 of 2006, s 6.



Religious institutions are particularly sensitive to the exercise of review powers by secular courts in regard to disciplinary proceedings of an ecclesiastical tribunal.<sup>86</sup> In South Africa, decisions of an ecclesiastical tribunal cannot be taken *on appeal* to a secular court, but such decisions are subject to *review* by a court of law.<sup>87</sup> The court exercising review powers will not interfere in the domestic affairs of the ecclesiastical institution duly constituted and operating in terms of its own rules, but will intervene if an ecclesiastical tribunal has failed to follow the internally prescribed procedural rules or acted *ultra vires*.<sup>88</sup> The tribunal must apply its mind to the matter and not take arbitrary decisions; it must remain within the confines of its authority and not act *ultra vires*; it must maintain good faith and not be motivated by malice, ill-will or spite; and it must act reasonably.<sup>89</sup>

In conducting disciplinary hearings, an ecclesiastical tribunal must uphold the 'elementary rules of justice'.<sup>90</sup> Emphasis is often placed on the right of a person under investigation to be heard in his or her own defence (*audi alteram partem*), but even then, the ultimate test is not *audi alteram partem* as such but 'the fairness of the process' in light of the nature of the proceedings.<sup>91</sup> The *audi alteram partem* rule in any event does not apply if the person wanting to be heard lays claim to a privilege to which he or she will normally not be entitled.<sup>92</sup>

Upholding the basic principles of justice and other constitutional rights of members of a religious institution has become critical in South Africa due to, and to the extent of, applying the Bill of Rights obligations to juristic persons. In *Taylor v Kurtstag*, the Witwatersrand Local Division of the High Court was confronted by exactly that dilemma.<sup>93</sup> The plaintiff in the matter had been served a notice of excommunication (*cherem*) from the Orthodox Jewish Faith by a Jewish ecclesiastical court (*Beth Din*) and applied for the *cherem* to be set aside on the grounds that it violated his constitutional right to freedom of religion (section 15(1) of the Constitution) and, as a component of the right to self-determination, the entitlement to practise his religion and maintain religious associations with fellow members of his faith (section 31(1)(b) of the Constitution). That indeed was found to be the case, but the Court went on to consider the legality of those violations in view of the limitations provisions of the Constitution (section 36).

<sup>86</sup> See Michael J Broyd, 'Forming Religious Communities and Respecting Dissenter's Rights: A Jewish Tradition for a Modern Society' in John Witte Jr and Johan D van der Vyver (eds), *Religious Human Rights in Global Perspective: Religious Perspectives* (The Hague Martinus Nijhoff, 1996) 203, 224 (noting that 'the question of membership in the colony of the Church should be beyond review of a secular court'), cited with approval in *Taylor v Kurtstag and Others*, 2005 (1) SA 362; 2005 (7) BCLR 705, para 43 (W) (South Africa).

<sup>87</sup> *Du Plessis v Synod of the Dutch Reformed Church*, 1930 CPD 403, 420–21 (South Africa); *Taylor* (n 86 above) 2005 (1) SA at para 42.

<sup>88</sup> *Odendaal v Loggerenberg NNO* (1), 1961 (1) SA 712 (0) 719 (South Africa); *Yiba and Others v African Gospel Church*, 1999 (2) SA 949, 961 (CPD) (South Africa); and see also *NGK in Afrika (OVS) v Verenigde Geref Kerk in Suider-Afrika*, 1999 (2) SA 156, 170 (SCA) (South Africa) (noting that the General Synod must comply with the internal rules of church law).

<sup>89</sup> JD van der Vyver, 'Religion' in WA Joubert and TJ Scott (eds), 23 *The Law of South Africa*, para 229, 1st edn (Durban/Pretoria, Butterworths (LexisNexis), 1986).

<sup>90</sup> *Theron v Ring van Wellington van die NG Kerk*, 1976 (2) SA 1 (A) 10 (South Africa); *Odendaal* (n 88 above) 1961 (1) SA 712 at 719.

<sup>91</sup> *Taylor* (n 86 above) 2005 (1) SA, at para 63.

<sup>92</sup> *Mankatshu v Old Apostolic Church of Africa and Others*, 1994 (2) SA 458 (Tk AD) 463–64 (South Africa); and see also *Jacobs v Old Apostolic Church of Africa and Another*, 1992 (4) SA 172 (Tk GD) (South Africa) (holding that a member of a Church cannot insist on inspecting the books and financial records of the Church where no such right has been vested in him by the Constitution of the Church).

<sup>93</sup> *Taylor* (n 86 above) 2005 (1) SA.



The Court noted that '[a] religious tribunal is subject to the discipline of the Constitution, but its being a religious body giving effect to the associational rights of its members, must be accounted for'.<sup>94</sup> Having noted that 'the reluctance to interfere in matters of faith, whether it be procedural or otherwise, cannot be discarded', and in the absence of 'evidence of bias or bad faith on the part of the *Beth Din*',<sup>95</sup> the Court upheld the constitutionality of its *cherem*.

(iii) *Implementation of the Equality Directive – Self-determination and Religious Symbols in the Public Sphere*<sup>96</sup>

A judgment of the South African Constitutional Court based on the non-discrimination provisions in the Act of 2000, or more precisely based on the proscription in the Act of discrimination based on religion and on culture,<sup>97</sup> was the 2006 case of Sunali Pillay, a Hindu girl who attended the prestigious Durban Girls' High School.<sup>98</sup>

When Ms Pillay returned to school after vacation wearing a golden nose stud, which is a custom in the Hindu community indicating that a girl has reached the age of eligibility for marriage, school authorities found her in violation of the school's code of conduct, which had been signed by her parents as a condition for Sunali's admission, and which prohibited the wearing of any jewellery, except earrings, and then only under meticulous conditions specified in the code. Though Sunali's mother explained that her daughter did not wear the nose stud as a token of fashion but in deference to an age-old tradition of the Hindu community, the school management refused to grant Sunali an exemption from its dress code. A complaint filed by Mrs Pillay in the Equality Court, based on discrimination, was answered in favour of the school, but the Natal Provincial Division of the High Court set aside the decision of the Equality Court on appeal.<sup>99</sup> The matter eventually came before the Constitutional Court, which decided that refusal by the school authorities to grant Sunali an exemption from the jewellery provision in the school's code of conduct amounted to unreasonable discrimination and was therefore unlawful.<sup>100</sup>

Basing its decision on the proscription of discrimination was perhaps dictated by the fact that the case came to the Constitutional Court via the Equality Court, and therefore under the Promotion of Equality and Prevention of Unfair Discrimination Act. Had the matter been raised along a different route, the Court might have been constrained to deal with it under the religion prong of the right of everyone to 'freedom of conscience, religion, thought, belief and opinion'.<sup>101</sup> It is somewhat surprising that the Court, while noting that prohibiting Sunali from wearing a nose stud 'affects other constitutional rights as well' (besides human dignity), mentioned freedom of expression only, and not freedom of religion.<sup>102</sup>

<sup>94</sup> *ibid*, at para 63.

<sup>95</sup> *ibid*, at para 62.

<sup>96</sup> This section is taken in part from JD van der Vyver, 'Equality and Sovereignty of Religious Institutions: A South African Perspective' (2012) 10 *Santa Clara Journal of International Law* 147, 163–64.

<sup>97</sup> *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) (South Africa) at para 68 (referring to The Promotion of Equality and Prevention of Unfair Discrimination Act (n 72 above), s 6).

<sup>98</sup> *Pillay v MEC for Education, Kwazulu-Natal, and Others* 2006 (6) SA 363 (EqC) (South Africa).

<sup>99</sup> *ibid*, 379, para 70.

<sup>100</sup> *MEC for Education* (n 97 above) 2008 (1) SA.

<sup>101</sup> South African Constitution, s 15(1).

<sup>102</sup> *MEC for Education* (n 97 above) 2008 (1) SA 474.

This omission was perhaps prompted by the Court's declining to decide definitively whether the wearing of a nose stud by Hindu women was a matter of religion or one of culture. The matter also fell squarely within the confines of the right to self-determination of cultural, religious, and linguistic communities, which, under the South African Constitution, includes the entitlement of such communities 'to enjoy their culture, practise their religion and use their language'.<sup>103</sup>

### III. CONCLUDING OBSERVATIONS

The South African and American approaches to state intervention in the internal affairs of religious institutions have much in common: In both countries the internal sphere sovereignty of religious institutions relating to labour relations will only be upheld if the duties of the employee are somehow linked to the spiritual calling and/or doctrinal practices of the religious institutions. Moreover, the entire spectrum of internal affairs of a religious institution is judged to be within its substantive domain; and this applies not only to religious institutions but to all non-state institutions that function as voluntary associations.<sup>104</sup>

Differences between American and South African jurisprudence relate to the internal powers of religious institutions. To avoid 'doctrinal entanglement', American courts will decline to exercise jurisdiction in cases where the merits of the case will require an inquiry into religiously defined doctrinal issues.<sup>105</sup> South African courts will not 'embark upon an evaluation of the acceptability, logic, consistency or comprehensibility of . . . [religious] belief'.<sup>106</sup> However, should a conflict arise as to the legal rights and duties of parties to a dispute, a court will not decline to give a judgment in the matter by reason of doctrinal issues that might have a bearing on those rights and duties.<sup>107</sup>

In *Ryland v Edros*,<sup>108</sup> Judge Farlam stated that the American position as to 'doctrinal entanglement' might well have become part of South African law in virtue of the new constitutional principles pertaining to freedom of religion. Although the South African Constitution does not have an Establishment Clause, the American rule pertaining to

<sup>103</sup> South African Constitution, s 35(1)(a).

<sup>104</sup> See in general van der Vyver, 'Sphere Sovereignty of Religious Institutions' (n 6 above) at 650–55.

<sup>105</sup> As to entanglement jurisprudence in the United States, see *Serbian Eastern Orthodox Diocese v Milivojevic*, 426 US 696 (1976) (United States); *Maryland and Virginia Churches v Sharpsburg Church*, 396 US 367 (1970) (United States); *Presbyterian Church v Hull Church*, 393 US 440 (1969) (United States); *Kedroff* (n 29 above) 244 US 94; *Watson* (n 8 above) 80 US 679 (13 Wall). In *Jones v Wolf*, a majority of the Supreme Court decided that a property dispute emanating from a church schism could indeed be decided on 'neutral principle' and the Court consequently exercised jurisdiction to resolve the dispute. *Jones v Wolf*, 443 US 595 (1979) (United States).

<sup>106</sup> *Christian Education SA v Minister of Education of the Government of the RSA*, 1999 (4) SA 1092, 1100; 1999 (9) BCLR 951 (SE) 958 (South Africa), upheld on appeal in *Christian Education v Minister of Education*, 2000 (4) SA 757 (CC) (South Africa); and see *Taylor* (n 86 above) 2005 (1) SA, para 61.

<sup>107</sup> *Allen and Others NNO v Gibbs and Others*, 1977 (3) SA 212, 218 (SEC) (South Africa). See also *Old Apostolic Church of Africa v Non-White Old Apostolic Church of Africa*, 1975 (2) SA 684 (C) (South Africa); *The Nederduitsche Hervormde Church v The Nederduitsche Hervormde of Gereformeerde Church* (1893) 10 Cape Law Journal 327 (South Africa); *Jamile v African Congregational Church*, 1971 (3) SA 836 (D) (South Africa); *Theron v Ring van Wellington van die NG Kerk in SA*, 1976 (2) SA 1 (A) (South Africa); *Taylor* (n 86 above) 2005 (1) SA.

<sup>108</sup> *Ryland v Edros*, 1997 (2) SA 690, 703; 1997 (1) BCLR 77, 86–87 (C) (South Africa); and see also *Christian Education SA* 1999 (4) SA, at 1100; at 1999 (9) BCLR at 957; *Taylor* 2005 (1) SA (n 86 above) at para 39.

‘doctrinal entanglement’ can also be based on free-exercise considerations.<sup>109</sup> However, South African courts have thus far declined to endorse the Farlam proposition.

American courts will also not inquire into compliance by ecclesiastical tribunals with their own internal procedural decrees, while South African courts will afford protection to ministers of religion (and other employees of religious institutions) who were subjected to disciplinary action by an ecclesiastical tribunal in violation of the internal rules of procedure of the religious institution.

In Germany, basic rights and freedoms guaranteed by the European Convention must be balanced against the obligations of ministers and other employees to respect and uphold the doctrinal dogma and practices of the religious institutions that employ them. But there, too, intervention by the ECtHR is largely confined to procedural directives: Give the matter some thought and consider whether or not the alleged transgression was really sufficiently serious to (substantially) outweigh the protected rights or freedoms of the employee.

Sphere sovereignty is further conditional in all three jurisdictions considered in this chapter upon the duty of the state to protect persons within its jurisdiction against religious practices that violate the right to life and bodily integrity of members of a religious community or the criminal proscriptions of vital importance to the state. Ritual murders, the killing of witches, female genital mutilation and similar practices embarked upon as a matter of religious belief cannot be tolerated under any circumstances.

Such proscription must not be seen as an infringement of the sovereignty of religious institutions. State sovereignty after all is also subject to international scrutiny, condemnation, and punitive action in instances where unbecoming practices of the state amount to a threat to the peace, a breach of the peace, or an act of aggression, or constitute the most serious crimes of concern to the international community as a whole.

As Lord Millet said in reference to atrocities committed by President Pinochet against the people of Chile: ‘The way in which a state treated its own citizens within its own borders had become a matter of legitimate concern to the entire international community’.<sup>110</sup> The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia proclaimed in similar vein in the case of *Prosecutor v Duško Tadić*: ‘It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights’.<sup>111</sup>

<sup>109</sup> In *Ryland*, Judge Farlam referred in this regard to *United States v Ballard*, 322 US 78 (1944) (United States).

<sup>110</sup> *R v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (Amnesty International and Others Intervening)* (No 3), [1999] 2 All ER 97, 177 (HL) (United Kingdom).

<sup>111</sup> *Prosecutor v Duško Tadić* (Jurisdiction), Case No IT-94-1-A, para 58 (2 October 1995) (ICTY).

# *The Protection of Religious Freedom in Australia: A Comparative Assessment of Autonomy and Symbols*

PAUL BABIE AND JAMES KRUMREY-QUINN

## I. INTRODUCTION

AS RELIGION BECOMES increasingly important in the lives of individuals globally, the protection of the freedom to express that importance comes under increasing threat. According to the Pew Forum on Religion and Public Life, nearly 70 per cent of the world's 6.8 billion people live in countries with high restrictions on religion,<sup>1</sup> which can take two forms, either 'official curbs on faith [or] . . . hostility that believers endure at the hands of fellow citizens'.<sup>2</sup> Typically, at such times, a country's citizens might turn to constitutional protections as a bulwark against such encroachments. In Australia, citizens may believe that they too enjoy limitations on the ability of government to infringe upon their exercise of religious autonomy or right to display symbols of those connections that matter deeply to them. Such a belief is erroneous. In fact, Australia remains the only western liberal democracy without a constitutional or legislative protection of fundamental rights and freedoms.<sup>3</sup>

Instead, Australia protects human rights generally, and religious freedom specifically, through a minimal patchwork of constitutional, legislative and common law provisions differing not only in their applications to the Commonwealth, State and Territory governments in the Australian federation, but also in the scope and strength of protection afforded. The limited application and restrictive interpretation afforded to § 116 of the Australian Constitution leaves protection of religious freedom to the whim of the State and Territory legislatures, typically through non-constitutionally entrenched anti-discrimination regimes.<sup>4</sup> Thus, while it would be unlawful for the state to favour a

<sup>1</sup> Pew Forum on Religion & Public Life, 'Global Restrictions on Religion' (2009): [pewforum.org/uploaded-Files/Topics/Issues/Government/restrictions-fullreport.pdf](http://pewforum.org/uploaded-Files/Topics/Issues/Government/restrictions-fullreport.pdf), 1.

<sup>2</sup> 'Religious Freedom: Too Many Chains', *The Economist* (19 December 2009) 111.

<sup>3</sup> Paul Babeie and Nevile Rochow, 'Feels Like Déjà Vu: An Australian Bill of Rights and Religious Freedom' (2010) 3 *Brigham Young University Law Review* 821. See also Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) [610]–[629].

<sup>4</sup> Section 116 of the Australian Constitution, similar in its language to the First Amendment to the US Constitution, provides the only constitutional protection available for religion in Australia, although this has been severely limited by judicial interpretation, as this chapter will show.

particular religion on the basis that it would constitute unlawful discrimination, it is not unlawful to prohibit religious worship altogether. Of course, political and social conventions presently hold the legislature at bay, with minimal support from this patchwork protection.

The distinctive approach to religious protection is a hybrid of the European and US positions. The approach differs between the jurisdictions of the Commonwealth, States, and Territories, making it difficult categorically to describe the Australian position as one of ‘separation or accommodation’, ‘neutrality or plurality’, or ‘secularism or secularity’, to use the very useful opposing descriptors set out by McCrudden and Scharffs in the introduction to this Part.<sup>5</sup> For example, whilst the Constitution provides a distinct separation of church and state, its limited applicability to the States means that State courts are required to accommodate the interests of the religious and non-religious under different legislative regimes.

This chapter has two objectives. The first, in Section II, is to provide an overview of the protections of religious freedom in Australia, outlining the protections found in the Australian Constitution, the State and Territory anti-discrimination regimes, the emerging protections under State legislative human rights charters, and possible protection found in common law rules of statutory interpretation.<sup>6</sup> Having outlined the limited Australian protection of religious freedom, Section III seeks to contextualise those protections through a comparative analysis of specific sets of facts drawn from other national jurisdictions where religious freedom has been threatened and protection sought. The foreign result is compared in each case with the approach that might hypothetically be taken were the case to come before an Australian court. Given the dearth of relevant Australian case law on the freedom of religion, this part focuses on disputes arising in religious schools. The cases that we have selected are analysed in two parts: (i) the freedom of religion from the state, which draws on the perspective of the religious faithful with respect to employment of staff in religious schools, and (ii) the freedom of the state from religion, drawing on the state perspective through an analysis of the place of religious symbols in public schools. Section IV offers some brief conclusions, which seek to characterise Australia’s approach to the intersection of these two areas of protection for religious freedom.

## II. THE PROTECTION OF RELIGIOUS FREEDOM IN AUSTRALIA

Australia’s Federal democratic governmental structure, consisting of a Federal or Commonwealth government and six State and two Territory governments, carries with it implications for the protection of religious freedom. This Section considers, first, the limited constitutional protections contained in the Commonwealth Constitution, secondly, the more substantial legislative protections provided by Commonwealth, State and Territory statutes, and finally, protections found at common law.

<sup>5</sup> McCrudden and Scharffs, [chapter ten](#) of this volume, Section III.A, B, C.

<sup>6</sup> Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Annandale NSW, Federation Press, 2012).

## A. The Australian Commonwealth Constitution

While lacking an entrenched bill or charter of rights, the Commonwealth Constitution nonetheless confers limited religious protection in § 116.<sup>7</sup> The first of § 116's independent clauses prohibits the establishment of religion; this has been narrowly defined as prohibiting the adoption of any religion as an institution of state,<sup>8</sup> rather than prohibiting any law which merely 'touches or relates to' religion.<sup>9</sup> The second clause prohibits forced religious observance.<sup>10</sup> The third prohibits any laws enacted for the purpose – rather than with the effect – of interfering with the freedom of religion.<sup>11</sup> The courts have further narrowed the scope of the third clause by holding that legislation necessary for some overriding public purpose or pressing social need fails to infringe the freedom.<sup>12</sup> Finally, § 116 prohibits the creation of a religious test for a Commonwealth office. There have been very few successful actions pursuant to any of the § 116 clauses.

Two major limitations further restrict the usefulness of § 116. First, because it acts only as a limitation on the Commonwealth's legislative power,<sup>13</sup> the provision does not create an individual right to religious freedom,<sup>14</sup> and so also fails to provide recourse to any remedy sounding in damages.<sup>15</sup> Secondly, § 116 does not apply to the States,<sup>16</sup> and it may not apply to the Territories.<sup>17</sup> Consequently, the Constitution does nothing to prevent States or Territories from enacting anti-discrimination legislation that may infringe religious freedom. We turn to consider the approach in fact adopted in the next Section.

Overall, the narrow interpretation afforded to § 116 has led to a paucity of jurisprudence on the scope of religious freedom in Australia, with the High Court in effect handing competency for resolution of the conflicting interests of the religious and non-religious to the various legislatures.

<sup>7</sup> The text of § 116 reads: 'The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth'. Other Federal or State constitutional protections exist. The *Constitution Act 1934* (Tas), s 46(1), for instance, recognises various religious freedoms for every citizen, although the provision has not been judicially invoked. Federally, the implied constitutional freedom of political communication might also be argued as a source of protection for religion in Australia: see, eg, *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334 (Australia).

<sup>8</sup> *Att-Gen (Vic), Ex rel Black v Commonwealth* (1981) 146 CLR 559 (*Defense of Government Schools (DOGS case)*), 582 (Barwick CJ), 604 (Gibbs J), 612 (Mason J), 653 (Wilson J) (Australia). Eg, legislation providing for the funding of religiously-affiliated schools has been held valid despite the establishment clause: *DOGS case*.

<sup>9</sup> *ibid*, 616 (Mason J) reasoning that this approach is not permitted under the Australian Constitution.

<sup>10</sup> This has received little judicial attention. See, though, *R v Winneke, Ex parte Gallagher* (1982) 152 CLR 211, 229 (Murphy J) (Australia).

<sup>11</sup> *Kruger v Commonwealth* (1997) 190 CLR 1, 40 (Australia). cf *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 122–23 (Latham CJ); *Kruger* (1997) 190 CLR 1, 131–32 (Gaudron J) (Australia).

<sup>12</sup> *ibid*, 133–34 (Gaudron J). See, also, *Jehovah's Witnesses Inc* (n 10 above) 155 (Starke J).

<sup>13</sup> *DOGS case* (n 7 above) 579–81 (Barwick CJ); *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373, 378 (Jackson J) (Australia). To the extent that executive decisions are based on legislation, the provision would also in effect limit executive power: *DOGS case* (n 7 above) 580–81 (Barwick CJ).

<sup>14</sup> *DOGS case* (n 7 above) 605 (Stephan J), 652 (Wilson J).

<sup>15</sup> *Kruger* (n 10 above) 125 (Gaudron J).

<sup>16</sup> *Grace Bible Church v Reedman* (1984) 36 SASR 376 (Australia); *Kruger* (n 10 above) 60 (Gaudron J).

<sup>17</sup> Uncertainty exists as to whether the Commonwealth's law-making power in relation to the Territories is subject to the constitutional freedoms generally: *Kruger* (n 10 above) 123 (Gaudron J).

## B. Commonwealth, State and Territory Legislative Protections

In Australia, one finds protection for religious freedom largely in Commonwealth, State and Territory legislation.<sup>18</sup> Most jurisdictions prohibit discrimination on the basis of religion,<sup>19</sup> including a lack of religious belief.<sup>20</sup> Discrimination may be either direct or indirect, with the former focusing upon the purpose of the conduct and the latter on its effect.<sup>21</sup> Where no such prohibition exists, some religious groups have been held to fall within the definition of race.<sup>22</sup>

Still, the prohibition of discrimination on the basis of religion is typically far from the primary purpose of such legislation. Rather, such regimes normally afford protection in the form of specific exemptions for religion found in general anti-discrimination,<sup>23</sup> and employment legislation.<sup>24</sup> Significant overlap between Commonwealth, State and Territory anti-discrimination regimes,<sup>25</sup> as well as between anti-discrimination and employment regimes<sup>26</sup> means that actions are generally capable of being brought under more than one regime, save for those where the alleged discrimination involves a Commonwealth officer or department.<sup>27</sup>

In order to engage in lawful discriminatory conduct, the party seeking to rely upon it must establish that the discriminatory conduct conforms to the doctrines of that religion,<sup>28</sup> is necessary to avoid injury to the religious susceptibilities of the adherents of

<sup>18</sup> This Section focuses upon legislation from the three largest jurisdictions: the Commonwealth of Australia, New South Wales and Victoria.

<sup>19</sup> Equal Opportunity Act 2010 (Vic), s 6(1)(n); Fair Work Act 2009 (Cth), ss 153, 195, 351, 772. Religious discrimination is not prohibited under the New South Wales or Commonwealth anti-discrimination regimes.

<sup>20</sup> Equal Opportunity Act 2010 (Vic), s 4(1). See also *Dixon v Anti-Discrimination Commissioner of Queensland* [2004] QSC 58, [21] (Australia).

<sup>21</sup> Equal Opportunity Act 2010 (Vic), s 8.

<sup>22</sup> See, eg *Jones v Scully* (2002) 120 FCR 243, 272 (Australia); *Haider v Combined District Radio Cabs Pty Ltd trading as Central Coast Taxis* [2008] NSWADT 123 (24 April 2008) (Australia). Further, in New South Wales the obligation extends to ethno-religious discrimination, although this has not been held to extend to discrimination on religious grounds: *A obo V and A v Department of School Education* [1999] NSWADT 120 (12 November 1999) (Australia).

<sup>23</sup> Anti-Discrimination Act 1977 (NSW); Equal Opportunity Act 2010 (Vic); Age Discrimination Act 2004 (Cth); Equal Opportunity for Women in the Workplace Act 1999 (Cth); Disability Discrimination Act 1992 (Cth); Sex Discrimination Act 1984 (Cth); Racial Discrimination Act 1975 (Cth). The Federal government announced in 2010 its intention to streamline the Commonwealth anti-discrimination laws: Robert McClelland (Att-Gen), and Lindsay Tanner (Minister for Finance and Deregulation), 'Reform of Anti-Discrimination Legislation: Joint Media Release' (21 April 2010).

<sup>24</sup> Fair Work Act 2009 (Cth). This legislation applies to the States, as all (bar Western Australia) have for this purpose conferred the Commonwealth with industrial relations powers pursuant to s 51(xxxvii) of the Commonwealth Constitution: Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials*, 5th edn (Annandale NSW, Federation Press, 2009) 995.

<sup>25</sup> Beth Gaze and Rosemary Hunter, *Enforcing Human Rights: An Evaluation of the New Regime* (Annandale NSW, Themis Press, 2010) 52–54, 138–39.

<sup>26</sup> See, eg Fair Work Act 2009 (Cth) s 351(2)(a) which permits an exception for discriminatory conduct that is lawful under anti-discrimination law of the Commonwealth or States or Territories. See also C Sappideen, P O'Grady, G Warburton and K Eastman, *Macken's Law of Employment*, 7th edn (Pyrmont NSW, Lawbook Co, 2011) 606–7 who questions whether this limits the scope of the subsequent exceptions within the same provision.

<sup>27</sup> Gaze and Hunter (n 25 above) 52–54, 138–39.

<sup>28</sup> The conformity test has been noted as 'singularly undemanding' for its requirement that an act or practice be merely in conformity with rather than a breach of the doctrine: *OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293, [35] (10 December 2010) (Australia). See also *OV v Members of the Board of Wesley Mission Council* (2010) 270 ALR 542 [72] (Basten JA and Handley AJA) (Australia). cf *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] USCA 75. Where Maxwell P held



that religion,<sup>29</sup> or is based on the inherent requirements of a particular position of employment.<sup>30</sup> The exemptions operate to the benefit of religious orders, bodies or institutions more generally,<sup>31</sup> as well as religious and non-religious educational institutions more specifically.<sup>32</sup> The granting of an exemption to a religious educational institution specifically permits discrimination in relation to student enrolments, student access to benefits or detriments, and student expulsion,<sup>33</sup> as well as student dress and appearance,<sup>34</sup> and the employment of staff.<sup>35</sup> Rather than offering a *carte blanche* to discriminate, exemptions generally are limited to particular grounds, differing as between jurisdictions. Whereas most permit discrimination on the basis of sex, religious belief, marital status, sexual orientation, pregnancy, and gender identity, Commonwealth employment legislation also permits discrimination as to race, colour, age, physical or mental disability, political opinion, national extraction, and social origin.<sup>36</sup>

While some criticise the relevant tests for being too weak in allowing courts to weigh evidence of and decide as to matters of a theological nature,<sup>37</sup> others have questioned their permissiveness and their role in a society built on equality.<sup>38</sup> Both criticisms reflect the legislature's decision to place the balancing of prescribed factors in the hands of the judiciary. Excessive intolerance in internal affairs is not permitted, creating a regime more akin to McCrudden and Scharffs' *Pluriana* than their *Neutralia*.<sup>39</sup> Partially as a response to these concerns, at least two Australian jurisdictions, Victoria and the

that 'conformity' required that religious doctrine meant that a person has no alternative but to act in a particular way: [286].

<sup>29</sup> 'Injury' requires something more than mere offence: *Hozack v Church of Jesus Christ of Latter-Day Saints* (1997) 79 FCR 441, 444 (Australia).

<sup>30</sup> Fair Work Act 2009 (Cth), ss 153(2)(a) and 195(2)(a) (discriminatory terms), s 351(2)(b) (discriminatory actions against a staff member), s 772(2)(b) (discriminatory termination).

<sup>31</sup> Anti-Discrimination Act 1977 (NSW), s 56(a)–(d); Equal Opportunity Act 2010 (Vic), s 82; Fair Work Act 2009 (Cth), ss 153(2)(c), 195(2)(c), 351 (2)(c), 772(2)(c); Sex Discrimination Act 1984 (Cth), s 37(a), (b), (d).

<sup>32</sup> Anti-Discrimination Act 1977 (NSW), ss 31A, 31K, 46A, 49ZO; Equal Opportunity Act 2010 (Vic), s 39, 83; Sex Discrimination Act 1984 (Cth), s 38.

<sup>33</sup> Anti-Discrimination Act 1977 (NSW), ss 31A, 31K, 46A, 49ZO; Sex Discrimination Act 1984 (Cth), s 38, 7(a), (b), (d).

<sup>34</sup> Equal Opportunity Act 2010 (Vic), s 42.

<sup>35</sup> Fair Work Act 2009 (Cth), ss 153(2)(a) and 195(2)(a), s 351(2)(b), s 772(2)(b) Sex Discrimination Act 1984 (Cth) s 38.

<sup>36</sup> The extent to which discrimination on bases other than religious grounds is permitted in schools (especially in employment) has been questioned: see Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30 *Adelaide Law Review* 31, 55–56; Margaret Thornton, 'Excepting Equality in the Victorian Equal Opportunity Act' (2010) 23 *Australian Journal of Labour Law* 240, 245–46.

<sup>37</sup> Foster (n 24 above) 26–27; Bishops, Dioceses and Agencies of the Catholic Church, 'Submission to Australian Human Rights Commission: Consultation on Protection from Discrimination on the Basis of Sexual Orientation and Sex and/or Gender Identity' (10 December 2010) [38].

<sup>38</sup> See the recent comments called for the rolling back of exemptions, especially where religious schools receive majority government funding, in relation to an initial refusal of a Catholic school to enrol a student because the parents were a same-sex couple: Australian Broadcasting Corporation, 'Same-sex Enrolment Row Prompts Call for Law Change' (15 December 2011): [www.abc.net.au/news/2011-12-15/same-sex-enrolment-row-sparks-call-for-law-change/3732522](http://www.abc.net.au/news/2011-12-15/same-sex-enrolment-row-sparks-call-for-law-change/3732522); Australian Broadcasting Corporation, 'School 'Victimising' Daughter of Same-sex Couple' (4 January 2012): [www.abc.net.au/news/2011-12-14/school-victimising-daughter-of-same-sex-couple/3730328](http://www.abc.net.au/news/2011-12-14/school-victimising-daughter-of-same-sex-couple/3730328). The word 'exemption' has been criticised as not appropriately recognising the importance of religious groups' ability to discriminate in accordance with their religious commitments: Neil Foster, 'Freedom of Religion in Practice: Exemptions under Anti-Discrimination Laws on the Basis of Religion' (Paper presented at *Law and Religion: Legal Regulation of Religious Groups, Organisations and Communities*, University of Melbourne, 15–16 July 2011) 28. The Australian Human Rights Commission (AHRC) prefers the use of the term 'accommodations': AHRC, '2011 Report on Freedom of Religion and Belief in 21st Century Australia' (2011) 9, 33.

<sup>39</sup> McCrudden and Scharffs chapter ten, III.B.

Australian Capital Territory (the ACT), have gone further in enacting comprehensive regimes for the protection of fundamental rights and freedoms.

### C. The Victorian and Australian Capital Territory Statutory 'Bills' of Rights

In addition to their anti-discrimination regimes, both Victoria and the ACT have adopted statutory bills of rights.<sup>40</sup> Still, while this might at first blush appear significant, both allow compensation or the invalidation of legislation only at the policy and legislative drafting stage, rather than at the point of breach.<sup>41</sup> The bills of rights achieve this through their application to the functions of parliament, courts and tribunals, and public authorities.<sup>42</sup>

Under the Victorian and ACT bills, the judiciary plays three roles. First, using a common method of statutory interpretation,<sup>43</sup> the court construes statutes in a way compatible with the substantive human rights provisions contained in the bills,<sup>44</sup> and possibly also any reasonable limits thereon that may be 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.<sup>45</sup> Where rights conflict, the court must choose an interpretation recognising their co-existence.<sup>46</sup> The process differs from the existing position under the common law by 'expand[ing] the range of background considerations against which the effect of a provision falls to be assessed'.<sup>47</sup> Secondly, where no ambiguity exists and a statutory provision conflicts with a human right, the court may make a declaration of inconsistent interpretation, although this does not render the provision invalid.<sup>48</sup> Thirdly, the court adjudicates actions brought against public authorities for failing to act in accordance with the bill.<sup>49</sup> However, the Victorian bill creates no new or independent cause of action or remedy.<sup>50</sup> In fact, in Victoria a breach of one of the rights only gives rise to relief where there is a right to seek such relief or remedy from a source other than the bill of rights itself.<sup>51</sup>

The bills of rights protect freedom of religion in four ways. First, every person enjoys a freedom of thought, conscience, religion and belief.<sup>52</sup> This includes freedom to adopt a religion and freedom to demonstrate one's religion, where the former relates to autonomy of mind and the latter relates to autonomy of physical practice.<sup>53</sup> Secondly, all persons with a particular religious background enjoy a right to declare and practise their

<sup>40</sup> Human Rights Act 2004 (ACT) (HRA 2004); Charter of Human Rights and Responsibilities Act 2006 (Vic) (CHHRA 2006).

<sup>41</sup> Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (Sydney, Lawbook Co, 2008) 10.

<sup>42</sup> CHHRA 2006, s 6(2); HRA 2004, Pts 4–6.

<sup>43</sup> *Momcilovic v The Queen* (2011) 245 CLR 1, [51] (French CJ), [170] (Gummow J) (Australia).

<sup>44</sup> CHHRA 2006, s 32(1); HRA 2004, s 30.

<sup>45</sup> CHHRA 2006, s 7(2); HRA 2004 s 28; *Momcilovic* (n 43 above) [168] (Gummow J).

<sup>46</sup> *Cobaw* (n 28 above) [225].

<sup>47</sup> *Noone v Operation Smile (Australia) Inc* [2012] VSCA 91, [139] (11 May 2012) (Nettle JA) (Australia). See also *Momcilovic* (n 43 above) [50] (French CJ).

<sup>48</sup> CHHRA 2006, s 36; HRA 2004, s 32.

<sup>49</sup> CHHRA 2006, s 38; HRA 2004, s 40B.

<sup>50</sup> CHHRA 2006, s 39; *Director of Housing v Sudi* [2011] VSCA 266, [214] (Weinberg JA) (Australia). By contrast, the ACT permits a direct right of action: HRA 2004, s 40C(2)(a); Legislative Assembly for the ACT, 'Human Rights Amendment Bill 2007: Explanatory Statement' (2007) 6.

<sup>51</sup> CHHRA 2006, s 39(1).

<sup>52</sup> CHHRA 2006, s 14; HRA 2004, s 14.

<sup>53</sup> CHHRA 2006, s 14; HRA 2004, s 14.

religion.<sup>54</sup> Thirdly, the freedom must be read in conjunction with the enjoyment of all human rights without discrimination.<sup>55</sup> Fourthly, any incursions on freedom of religion are subject to ‘reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom’.<sup>56</sup> The formulation of these protections is analogous to the European Convention on Human Rights – there being neither express nor (any likely) implicit separation of church and state<sup>57</sup> – requiring the accommodation of competing interests rather than the construction of impenetrable walls of religious isolation.

The major criticism of these bills of rights resides in the fact that they are much less effective in checking exercises of state power than constitutionally entrenched bills of rights that the courts may protect through the power to grant a range of remedies, including the power to invalidate legislation. The criticism may gain weight given the sadly uncertain future of the Victorian Charter. In its 2011 mandatory review of the Charter, the Victorian Parliament’s Scrutiny of Acts and Regulations Committee (SARC) noted that ‘[t]he key Charter provisions that apply in the courts are subject to major uncertainties about their meaning and operation and require significant alterations before they can be considered workable and accessible’,<sup>58</sup> recommending that the role of the courts in the Charter be entirely displaced by Parliament.<sup>59</sup> A majority of the SARC recommended that ‘the “experiment” of giving courts a role in the human rights regime be stopped at an early stage, before its negative impacts become irrevocably entrenched in Victoria’s legal system’.<sup>60</sup> Sentiment is much more optimistic in the ACT. A five-year independent report tabled before Parliament praised the impact of the ACT Human Rights Act at the policy and legislative level, recommending only incremental improvements.<sup>61</sup> A subsequent report recommended the enactment of social and cultural rights.<sup>62</sup> In 2012 the ACT Parliament enacted a right to education, although limited by the right to discrimination, and the right of parents ‘to ensure the religious and moral

<sup>54</sup> CHHRA 2006, s 19(1) (this extends to Aboriginal Australians in maintaining their spirituality: s 19(2)(d)); HRA 2004, s 27.

<sup>55</sup> CHHRA 2006, s 8(2); HRA 2004, s 8(2). In Victoria, discrimination is defined as falling within the meaning of s 6 of the Victorian anti-discrimination legislation, which itself includes discrimination on the grounds of religious belief and activity: Equal Opportunity Act 2010 (Vic). See also Pound and Evans (n 41 above) 87–9. By contrast, the ACT bill lists anti-discrimination legislation as a right that exists in addition to those listed in the bill: HRA 2004, s 7. As applied to s 14 (freedom of religion), see *Cobaw* (n 28 above).

<sup>56</sup> CHHRA 2006, s 7(2); HRA 2004, s 28.

<sup>57</sup> The rights protected in the statutory bills of rights are largely expressed in the same terms as the International Covenant on Civil and Political Rights (ICCPR): Department of Justice Victoria, ‘Charter of Human Rights and Responsibilities Bill: Explanatory Memorandum’ (May 2006) 8; *R v AM* [2010] ACTSC 149, [25] (15 November 2010) (Australia). Further, in construing the provisions of the bill of rights, regard may be had to international human rights materials: CHHRA 2006, s 32(2). The reasoning of the Human Rights Committee in relation to the similarly worded art 18 of the ICCPR is therefore likely to prevail – establishment of religion is compatible with art 18 to the extent that the rights under art 18 are preserved: Human Rights Committee, ‘General Comment No 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)’ UN Doc CCPR/C/21/Rev.1/Add.4 (1993) [9], [10].

<sup>58</sup> Scrutiny of Acts and Regulations Committee (n 3 above) [681].

<sup>59</sup> *ibid*, recommendation 35 and discussions at [679]–[692].

<sup>60</sup> *ibid*, recommendation 35 and discussions at [684].

<sup>61</sup> ACT Human Rights Research Project and the Australian National University, ‘The Human Rights Act 2004 (ACT): The First Five Years of Operation: A Report to the ACT Department of Justice and Community Safety’ (2009). See also The Government’s Continuing General Support for Act: ACT Government, ‘Government Response: The Human Rights Act 2004 (ACT): The First Five Years of Operation’ (March 2012).

<sup>62</sup> ACT Economic, Social And Cultural Rights Research Project, *Report* (September 2010).

education of a child in conformity with [the parents'] convictions'.<sup>63</sup> Still, the attitude of the second largest State and the Federal government give cause for despair.

#### D. Common Law Principles of Statutory Interpretation

The common law adds little to the bleak picture painted of human rights protection in Australia. Although recognised as being of fundamental importance to a free society,<sup>64</sup> there is no 'inalienable right of religious freedom and expression' under the common law of Australia.<sup>65</sup> Nevertheless, such a freedom does form the basis of a principle of construction that legislation can only take away long-established rights and freedoms where clear words are used,<sup>66</sup> sometimes referred to as the 'common law bill of rights'.<sup>67</sup> Article 18 (on religious freedom) of the ICCPR forms part of this 'bill of rights' because of Australia's obligations under international law.<sup>68</sup> Most recently, the Federal Court of Australia stated that this includes protection of religious freedom, finding that it had been 'generally accepted in Australian society'.<sup>69</sup> Besides not giving rise to a stand-alone right,<sup>70</sup> the basis of such a right at common law is both questionable<sup>71</sup> and subject to easy modification by contrary statutory intention.<sup>72</sup> This failure to discuss the different interests affecting religious freedom makes it therefore difficult to characterise the precise approach adopted.

With this brief outline of the Australian legal position concerning the protection of religious freedom, Section III turns to a more detailed comparative assessment of its operation.

### III. COMPARATIVE ASSESSMENT

Modern Australia emerged from a series of colonies, the first of which was established in 1788. The early Australian colonial governments initially helped religions establish themselves, assisting with the construction of religious buildings and the funding of religious schools.<sup>73</sup> Although state aid to religion had ceased by the 1900s,<sup>74</sup> what evolved was a political convention of religious equality and tolerance in which no religion received from

<sup>63</sup> Human Rights Act 2004, s 27A.

<sup>64</sup> *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130 (Australia); *Aboriginal Legal Rights Movement Inc v South Australia (No 1)* (1995) 64 SASR 551, 552 (Australia); *Canterbury Municipal Council v Moslem Alawiy Society Ltd* (1985) 1 NSWLR 525, 544 (Australia).

<sup>65</sup> *Grace Bible Church* (n 155 above) 389.

<sup>66</sup> *Evans v New South Wales* (2008) 168 FCR 576, 580 [8] (Australia); *Aboriginal Legal Rights Movement Inc* (n 64 above) 552.

<sup>67</sup> James Spiegelman, 'The Common Law Bill of Rights' (Speech delivered at *McPherson Lectures on Statutory Interpretation and Human Rights*, University of Queensland, 10 March 2008).

<sup>68</sup> *Cobaw* [2014] USCA 75, [188]–[197] (applied to religious exemptions in anti-discrimination legislation).

<sup>69</sup> *Evans v NSW* (n 66 above) 596, [79].

<sup>70</sup> *Evans*, 'Legal Protection of Religious Freedom in Australia' (n 6 above) 89. cf Kevin Boreham, *International Law as an Influence on the Development of the Common Law: Evans v New South Wales*' (2008) 19 *Public Law Review* 271, 273.

<sup>71</sup> See, eg, Simon Bronitt, 'Taking Public Order Seriously: World Youth Day and a Right to be Annoying?' (2008) 32 *Criminal Law Journal* 265, 266–7.

<sup>72</sup> *Aboriginal Legal Rights Movement Inc* (n 64 above) 552.

<sup>73</sup> Stephen McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116' (1992) 18 *Monash University Law Review* 207, 213–17.

<sup>74</sup> *ibid*, 221.

government any preference above other religions.<sup>75</sup> Equality between religions also came to be recognised as underlying the constitutional protection of religious freedom.<sup>76</sup>

The emphasis on religious equality rather than religious freedom may have its roots in Australia's migration history, with only a small number of minority religious groups making their way to Australia.<sup>77</sup> As important as religion was in Australia, its protection did not therefore carry the same imperative as it did in the United States.<sup>78</sup> Although the Australian protection of religious freedom was ostensibly modelled on the US Constitution, the wording of the provisions is in parts 'radically' different,<sup>79</sup> reflecting a conscious decision on the part of the Australian constitutional drafter to depart from the US approach. For example, whereas the First Amendment prohibits laws '*respecting*' the establishment of religion or free exercise of religion, § 116 prohibits laws '*for*' establishing any religion or free exercise of religion.<sup>80</sup> The Australian text therefore turns to the object or purpose rather than merely to the relationship with the subject-matter.<sup>81</sup> This different wording combined with the different histories of the two states has resulted in the Australian courts seldom drawing upon US jurisprudence in its – albeit limited – religious freedom jurisprudence.<sup>82</sup> This Section explores these differences through a comparative analysis of autonomy in the employment practices of *private* religious schools, moving then to consider the place of religious symbols in *public* (state) schools.

## A. Autonomy of Religious Schools in Employment Practices

The autonomy of religious institutions – or the ability of religious institutions to do as they wish within the confines of the institution – exemplifies the so-called freedom of religion from state.<sup>83</sup> Nowhere is this more relevant and likely to provoke debate in Australia than in the thousands of faith-based private primary and secondary schools throughout the country.<sup>84</sup> Given the level of financial support provided by State and Commonwealth governments, religious schools have received criticism for their discriminatory conduct targeted at maintaining their religious ethos, on the basis that it sub-

<sup>75</sup> *ibid.*, 221–22; Michael Hogan, 'Separation of Church and State?' *Australian Review of Public Affairs* (16 May 2001): [www.australianreview.net/digest/2001/05/hogan.html](http://www.australianreview.net/digest/2001/05/hogan.html).

<sup>76</sup> *DOGS case* (n 7 above) 617 (Mason J); McLeish (n 72 above) 223.

<sup>77</sup> See Alex Castles, *An Australian Legal History* (Sydney, Law Book, 1982) generally.

<sup>78</sup> *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*, 132 S Ct 694, 699–700 (2012) (United States).

<sup>79</sup> *DOGS case* (n 7 above) 579 (Barwick CJ). cf *DOGS case* (n 7 above) 632.

<sup>80</sup> *DOGS case* (n 7 above) 579 (Barwick CJ), 615–16 (Mason J), 632.

<sup>81</sup> *DOGS case* (n 7 above) 598 (Gibbs J), 615–16 (Mason J).

<sup>82</sup> *DOGS case* (n 7 above) 598–99 (Gibbs J). US cases have been considered although only in obiter dicta and generally only as at the time immediately preceding Australian federation in 1901: *DOGS case* (n 7 above) 579 (Barwick CJ), 599 (Gibbs J), 609–10 (Stephens J), 614–15 (Mason J). The only dissenting reasoning is that of Murphy J, who reasoned that the US decisions should be followed in Australia: *ibid.*, 632.

<sup>83</sup> This general definition of 'autonomy' differs from the narrow Calvinist definition adopted by van der Vyver in the previous chapter which concerns the internal functioning of, for example, a religious institution (rather than the interaction between institutions) referred to by van der Vyver as 'sphere sovereignty': van der Vyver [chapter twelve](#) of this volume. The appropriateness of this category is questionable. Van der Vyver defines the concept in terms of an internal sphere of competency not dependent on a concession of other institutions but existing in its own right. As individual rights to equality are carved out from state power and religious institutions are provided with only an exception to these rights, sphere sovereignty would appear an inappropriate descriptor.

<sup>84</sup> AHRC (n 24 above) 61.

verts multi-faith and multi-cultural Australian ideals and undermines the promotion of equality through anti-discrimination laws.<sup>85</sup> While religious institutions tend to accept non-religious students,<sup>86</sup> maintenance of the religious ethos through setting faith-based criteria for employment of teachers and other staff remains of importance to religious institutions.<sup>87</sup>

Due to the limited application of the Commonwealth constitutional protections, the primary source for the ability of religious schools to discriminate in hiring practices is the application of the exemptions to anti-discrimination and through employment legislation. Exemptions in Australia take a 'group-oriented approach', focusing on the effect of discrimination on the group and its members, rather than on the individual and whether they occupied a particular position within the institution, as is required in the United States. Although there may be room for an individual-based approach under the Australian Constitution,<sup>88</sup> such a change seems a long way off, with the High Court still largely focused on the limitation of governmental power rather than the preservation of individual liberties.

With that important distinction in mind, it is possible to examine a recent United States Supreme Court decision concerning the First Amendment of the US Constitution that epitomises the individual approach. In *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* a teacher, Cheryl Perich, brought discrimination proceedings against a Lutheran Church and school for dismissing her on the basis of her narcolepsy and her subsequent threat to take legal action rather than using the Church's internal dispute-resolution mechanisms.<sup>89</sup> The Supreme Court applied the 'ministerial exception', which operated to exempt the Church from the application of employment anti-discrimination legislation in relation to its ministers.

The ministerial exception derives from the First Amendment's Free Exercise and Establishment Clauses. These grant churches control over their own internal governance, including the selection of those who would personify their beliefs, thereby restricting the state's role in ecclesiastical decisions.<sup>90</sup> The Court defined 'minister' broadly, extending the definition to include not only heads of religious congregations,<sup>91</sup> but also those trusted with the teaching and conveying of the tenets of the faith,<sup>92</sup> within which Ms Perich was found to fall.<sup>93</sup> Consequently, the exception applied to exempt the Church from liability in terminating Ms Perich's employment.

Although discrimination on the basis of disability and religious activity are similarly prohibited in Australia, there exists no broadly construed exception on the basis of the

<sup>85</sup> *ibid*, 62–63. See also D Cahill, G Bouma, H Dellal and M Leahy, *Religion, Cultural Diversity and Safeguarding Australia: A Partnership under the Australia Government's Living Harmony Initiative* (Department of Immigration and Multicultural and Indigenous Affairs, and Australian Multicultural Foundation, 2004) 118.

<sup>86</sup> See, eg the submission of the Anglican Education Commission to the Australian Human Rights Commission: Bryan Cowling, *Submission to 'Freedom of Religion and Belief Project'* (Submission 1536): [www.hreoc.gov.au/frb/frb\\_submissions.html](http://www.hreoc.gov.au/frb/frb_submissions.html).

<sup>87</sup> See, generally, AHRC (n 24 above) 63–65.

<sup>88</sup> McLeish (n 72 above) 208.

<sup>89</sup> *Hosanna-Tabor* (n 77 above) 132 S Ct 694 (2012).

<sup>90</sup> *ibid*, 705–707.

<sup>91</sup> *ibid*, 707.

<sup>92</sup> *ibid*, 712–13 (Alito J concurring).

<sup>93</sup> *ibid*, 707–709.



nature of the position occupied. Rather, the test in Australia looks to the discriminatory act itself, compelling Australian courts to weigh evidence concerning the relevant Church doctrines and beliefs and the extent to which they are central to the job being undertaken or the beliefs of the Church's adherents. Australian superior courts have been at pains to refrain from making determinations on matters of faith, describing the evidential process as being one of 'arid characterisation'.<sup>94</sup> Greater deference nevertheless appears to be shown in the United States to religious institutions' characterisation of the importance of their practices.<sup>95</sup> Indeed, in determining whether it was essential that Ms Perich abide by the doctrine of internal dispute resolution and would consequently fall within the definition of minister, the Supreme Court merely deferred to the Church's determination of the substantial importance of the religious function that Ms Perich performed.<sup>96</sup> That there was no weighing of religious doctrine and belief makes impossible any objective comparison with the religious conformity and susceptibilities tests in Australia – including identification of the relevant variant of religion,<sup>97</sup> what the religion understands by the term doctrine,<sup>98</sup> and the beliefs that form part of its doctrines.<sup>99</sup>

On the surface, the inherent requirements test in Australia appears similar to the 'ministerial exception' in that it looks to the religious nature of Ms Perich's role and whether these requirements are necessary for such a teacher in the position of the plaintiff to function. However, whereas the scope of the US exception is settled, with the enquiry focusing on whether the teacher fits within the definition of minister, in Australia the scope depends upon the circumstances of each position. The level of religious responsibilities and leadership distinguish Ms Perich's case from Australian instances where no exemption has been granted – such as a church receptionist unlawfully dismissed for having an out-of-marriage relationship in circumstances where non-members in similar positions were not required to uphold the same religious standards,<sup>100</sup> or the CEO of a Catholic conference unlawfully discriminated against because she was not a Catholic, despite the bulk of religious responsibilities being carried out by a spiritual advisor.<sup>101</sup> Ms Perich's case might fall between these two cases on a leadership spectrum, suggesting an exemption would similarly be refused.

In this sense, the approach in Australia diverges from that taken in the United States, characterised by Evans in her chapter (eleven) as the 'immunity approach', an approach which 'expressly carves out some areas or roles from the usual protections of various types of labour – or other – laws'.<sup>102</sup> The Australian approach is less absolutist, since the circumstances of the position are the crucial aspect that will determine the outcome of the case. Thus, the Australian position leans closer towards what Evans has described as the 'rights balancing approach', which 'balances competing rights and significant inter-

<sup>94</sup> *Church of the New Faith* (n 64 above) 174; *Hozack* (n 29 above) 445.

<sup>95</sup> Positions of substantial importance within the Church are a matter for the Church to decide: *Hosanna-Tabor* (n 77 above) 712 (Alito J concurring).

<sup>96</sup> *Hosanna-Tabor* (n 77 above) 716 (Alito J concurring, Kagan J joining).

<sup>97</sup> *OV* (n 28 above) [41] f.

<sup>98</sup> This would depend upon the context, as the hierarchical structures used in the establishment of doctrine differ from one religion to the next: *ibid* [57]. See also the fact-driven approach taken in *Cobaw* [2014] USCA 75, [269]–[273].

<sup>99</sup> *OV* (n 28 above) [35], [54].

<sup>100</sup> *Hozack* (n 29 above).

<sup>101</sup> *Walsh v St Vincent de Paul Society Queensland* [2008] QADT 32 (12 December 2008) (Australia).

<sup>102</sup> Evans, [chapter eleven](#) of this volume.



ests of the employer and employee'.<sup>103</sup> The sort of context-based distinctions found in the European Court of Human Rights decisions in *Obst v Germany*<sup>104</sup> (concerning the dismissal of the Director of Public Relations of The Church of Jesus Christ of Latter-day Saints for adultery) and *Schiith v Germany*<sup>105</sup> (concerning the dismissal of a Roman Catholic Church organist for adultery), which turn on the circumstances of the individual's role within the religious institution, are likely to be the determining factor under the Australian approach as well. Through weighing religious doctrine and belief, Australian courts peer over (rather than crash through) the walls separating church from state. As such, Australia's position seems closer to the European than the US model.

It must also be noted that the State-based statutory bills of rights are unlikely to play any significant role in relation to autonomy in the hiring practices of religious institutions as they only provide a sword against government rather than private actions. Still, the interpretative provisions could be invoked to favour a pro-religion or pro-equality construction of the exemptions to anti-discrimination and employment legislation more generally.

## B. Legality of Religious Symbols in Public Schools

There is no broad principle of separation between church and state in Australia.<sup>106</sup> Rather, the relationship is more flexible, characteristic of the state's equal tolerance of, rather than its separation from, religions:<sup>107</sup> a secularity approach, rather than secularism.<sup>108</sup> This is exemplified by the weak protection afforded by the narrowly construed § 116 of the Constitution, which was designed, according to some commentators, as much as a political tool to overcome any fears that inclusion of 'God' in the Preamble to the Constitution would ground a power to legislate on religion as to construct a wall of separation.<sup>109</sup> Neither have Australians been receptive to any further extension of this protection.<sup>110</sup> Yet to truly understand the nature of the relationship between church and state, a more nuanced analysis is required, which approaches the topic from the perspective not only of religious institutions but also of the individual members of the faithful. The extent to which the state interferes in the faith-related pursuits of individuals can function as a barometer of the state's separation from the church. In this regard, the greatest protection is found in the obligations placed on the state to afford individuals religious freedom under State-based anti-discrimination and employment legislation, as well as under the statutory bills of rights.

<sup>103</sup> The 'genuine occupational requirement' exemption would squarely fall within the 'ordinary approach' as Evans herself points out: Evans, [chapter eleven](#) of this volume.

<sup>104</sup> *Obst v Germany* (App no 425/03), 23 September 2010 (ECtHR).

<sup>105</sup> *Schiith v Germany* (App no 1620/03), 23 September 2010 (2011) 52 EHRR 32 (ECtHR).

<sup>106</sup> *DOGS case* (n 7 above) 609; Luke Beck, 'Clear and Emphatic: The Separation of Church and State under the Australian Constitution' (2008) 27 *University of Tasmania Law Review* 161, 163.

<sup>107</sup> McLeish (n 72 above) 221–3.

<sup>108</sup> McCrudden and Scharffs' introduction ([chapter ten](#) of this volume).

<sup>109</sup> John Hatzistergos, 'Federation and Culture: Reflections on the Australian Constitution' (2009) 83 *Australian Law Journal* 810, 812–13, and the references cited therein; *DOGS case* (n 7 above) 654.

<sup>110</sup> The only two proposed amendments to s 116 have failed. See further, Evans, 'Legal Aspects of the Protection of Religious Freedom in Australia: Submission to Freedom of Religion and Belief Project' (n 17 above) 28.

In the educational context, the focus shifts from the freedom of religion within the religious school, to the freedom *from* but also *of* religion within the public school. Indeed, the seminal decision on the Australian establishment clause, the *DOGS case*, held that government funding of private religious schools did not constitute a violation of § 116. Most recently, criticism has been directed against the National Schools Chaplaincy Programme, which provides Commonwealth funding for religious chaplains to provide pastoral services in public schools.<sup>111</sup> Similar criticism has been directed at the manner in which religious instruction is carried out in public schools.<sup>112</sup> While the broader relationship between church and state in Australia has received significant comment, the place of religious symbols in Australian public life,<sup>113</sup> let alone in Australian schools,<sup>114</sup> has been almost ignored.

Religious symbols in public schools are significant in two respects. First, there may be a call for such symbols to be displayed within school grounds. Secondly, they may be worn by individual students. The remainder of this section considers each context in turn.

#### (i) Religious Symbols Displayed by Public Schools

The role of religious symbols in public schools has been most recently considered by the European Court of Human Rights (ECtHR) in *Lautsi v Italy*.<sup>115</sup> In that case, a crucifix was placed on the wall of the complainant's public school classroom pursuant to a governmental decree, justified on the basis that it represented Italy's historical development as well as the 'principles and values which formed the foundation of democracy and western civilisation'.<sup>116</sup> The complainant alleged a violation of the right to education, which is expressly limited by 'the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'.<sup>117</sup> In its Grand Chamber decision, the Court held that, although the state's obligations to teach and educate extended to the organisation of the learning environment,<sup>118</sup> the crucifix was a passive symbol and so did not lead to indoctrination of the students as might be the case with didactic speech or participation in religious activities.<sup>119</sup> Further, the greater visibility given to Christianity in schools needed to be considered in light of the religious pluralism that existed in Italian schools – there was no compulsory teaching about Christianity,<sup>120</sup> the

<sup>111</sup> AHRC (n 24 above) 60. See also the recent High Court decision invalidating the programme as falling outside the Federal Government's executive power. However, the Court found no breach of the religious test clause of § 116 of the Constitution: *Williams v Commonwealth* (2012) 248 CLR 156 (Australia).

<sup>112</sup> For example, in *Aitken v Victoria* [2012] VCAT 1547 (18 October 2012) (Australia) (*Aitken VCAT*) a Victorian tribunal held that the optional Special Religious Instruction Programme enacted pursuant to State legislation did not constitute discrimination against those who opted out of participating in the programme. Leave to appeal has been refused by the Victorian Court of Appeal: *Aitken v Victoria* [2013] VSCA 28 (22 February 2013) (Australia).

<sup>113</sup> See, eg, Anne Hewitt and Cornelia Koch, 'Can and Should Burqas be Banned: The Legality and Desirability of Bans of the Full Veil in Europe and Australia' (2011) 36 *Alternative Law Journal* 16, 20.

<sup>114</sup> However, see *Benjamin v Downs* [1976] 2 NSWLR 19 (Australia) where the NSW Supreme Court considered that school prayer constituted 'general religious instruction', which was permitted under the Public Instruction Act 1880 (NSW), rather than 'dogmatical or polemical theology'.

<sup>115</sup> *Lautsi v Italy* (App no 30814/06), 18 March 2011 (ECtHR).

<sup>116</sup> *ibid*, [67].

<sup>117</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms 1952 (No 1).

<sup>118</sup> *Lautsi* (n 114 above) [63]–[64].

<sup>119</sup> *ibid*, [66], [69], [71], [72].

<sup>120</sup> *ibid*, [74].

schools were open to students of all religions,<sup>121</sup> there was no proselytising within Italian public schools,<sup>122</sup> and the parents still retained their 'natural functions as educator' in relation to their children and so could steer them on a 'path in line with their own philosophical convictions'.<sup>123</sup> Finally, the Court held that the crucifix was appropriate given the lack of European consensus on the presence of religious symbols in Member State schools.<sup>124</sup> Thus, the presence of crucifixes did not interfere with the 'duty of neutrality and impartiality' required of Member States by the right to religious freedom.<sup>125</sup>

If similar facts were to come before Australian courts, the establishment clause of § 116 of the Constitution could arguably be invoked if the symbol were placed in a public school pursuant to Commonwealth funding.<sup>126</sup> The key consideration is the appropriation legislation's purpose. In Italy, the chief purpose of the decree appears to be a symbolic recognition of the historically close ties between the state and the Catholic Church. In Australia, although the establishment clause is most emphatic in the protections afforded to the state from religion,<sup>127</sup> it is unlikely that this purpose could in any way be construed as directed to the establishment of religion as an institution of the state, a 'relationship which goes much deeper than financial assistance'.<sup>128</sup> As in *Lautsi*, crucifixes would also be left to hang in Australian public schools.

There is perhaps a greater chance that the Commonwealth funding of displays of religious symbols would fall foul of § 116 under the religious observances limb. Although the ECtHR focused on whether the symbol constituted a form of religious teaching, the hanging of crucifixes in rooms by the school authorities is likely to constitute a form of religious custom and therefore fall within the scope of religious observance. Still, the mere presence of the students in the classroom is unlikely to constitute a religious observance carried out by the students as there is no custom associated with this action. That there is, for example, no required veneration of the symbol by the members of the class upon entrance to the classroom, leaves application of the clause ambiguous.

Regardless of the funding of religious displays in public schools, due to their direct legislative competence over schools, the approach under State or Territory legislation must also be considered. At least three examples can be given of the protection afforded to freedom of state from religion. First, the teaching of religion in public schools is regulated by State and Territory legislation.<sup>129</sup> In *Benjamin v Downs*, for instance, the New South Wales Supreme Court considered New South Wales legislation which provided for secular instruction that included 'general religious education as distinct from dog-

<sup>121</sup> *ibid.*

<sup>122</sup> *ibid.*

<sup>123</sup> *ibid.*, [75].

<sup>124</sup> *ibid.*, [70].

<sup>125</sup> *ibid.*, [60], [72].

<sup>126</sup> See the *DOGS case* (n 7 above) where Wilson J, in the context of Commonwealth funding of public schools, held that § 116 also acts as a limitation on appropriations legislation enacted with the purpose of establishing a religion: 651.

<sup>127</sup> *DOGS case* (n 7 above) 584 (Barwick CJ). Cf the more expansive US position, significant because the wording of the constitutional clauses are similar: J Joy Cumming, and Ralph D Mawdsley, 'Establishment Clauses, Legislation and Private School Funding in the United States and Australia: Recent Trends' (2009) 14 *International Journal of Law & Education* 63.

<sup>128</sup> *DOGS case* (n 7 above) 654.

<sup>129</sup> See, eg Education and Training Reform Act 2006 (Vic), s 2.2.11(1) and see *Aitken VCAT* (n 111 above). See also Education Act 1990 (NSW), s 30 (provides for secular instruction – the later provision of that considered in *Benjamin v Downs* (n 113 above)) and s 32 (provides for special religious education).

matic or polemical theology'.<sup>130</sup> The Court interpreted prayer as falling within the permissible general religious education. However, the legislation did not extend to religious symbols, and it is hard to see the hanging of a symbol as constituting 'instruction'. This appears to be consistent with the reasoning of the ECtHR in *Lautsi*.<sup>131</sup>

Secondly, while there are protections against direct discrimination on the basis of religion,<sup>132</sup> it remains questionable whether the mere hanging of religious symbols of a particular religion in classrooms constitutes a discriminatory action perpetrated against a student not of that particular faith. Rather, such treatment would have to fall within one of the areas regulated by the legislation, which includes suffering a 'detriment' of some kind.<sup>133</sup> Proof that mere observance of a crucifix in the room constitutes a detriment would likely depend upon the factual beliefs of the student's particular religion. The detriment would presumably be in the form of the student not being able to enter the classroom out of religious conviction rather than mere offence at the preferential treatment afforded to one faith.<sup>134</sup> Even so, the State has not engaged in discriminatory conduct on the basis of the student's religion but rather on the basis of the country's cultural heritage. Consequently, the difference (and weakness) in the Australian approach is that it relies on differential action between religions, failing therefore to look to the substantive right to religious freedom and, in turn, question the place of religion in public schools.

Thirdly, the Victorian and ACT bills of rights, although containing no express or implied establishment clauses, provide two potential remedies for the actions of public authorities such as government schools. The hanging of the crucifix may directly infringe the right to freedom of religion under article 14.<sup>135</sup> However, the hanging of the cross does not in any way impede non-believers' rights to declare and practise their religion. That can still easily occur outside the classroom; indeed, there is no evidence that a request was even made for alternative religious symbols to be hung.<sup>136</sup> This is in contrast to the more specific right considered by the ECtHR. Alternatively, an action might lie under the right to enjoy one's right without discrimination.<sup>137</sup> In the absence of case law on point, an analysis similar to that above is likely to be followed.<sup>138</sup> A third remedy might also lie if the ACT's bill of rights is amended to include a right to education. The analogous provision considered in *Lautsi* is likely to be a source of interpretation. Of course, for any cause of action to lie against a public authority under the bill of rights it

<sup>130</sup> *Benjamin v Downs* (n 113 above); Education Act 1880 (NSW).

<sup>131</sup> *Lautsi* (n 114 above) [66], [69], [71], [72].

<sup>132</sup> Although there is no prohibition on discrimination on basis of religion in New South Wales, the objects section of the Education Act 1990 (NSW) includes the provision of education without discrimination on basis of religion: s 6(1)(b).

<sup>133</sup> See, eg, Equal Opportunity Act 2010 (Vic), s 38(2)(c).

<sup>134</sup> The reasoning in *Aitken VCAT* (n 111 above) would appear to support this approach. There, a Victorian tribunal held that the legislative requirement that those not wishing to take part in Special Religious Instruction (SRI) opt-out of the programme did not result in direct discrimination as, amongst other things, separation from the rest of the class did not constitute a detriment and there was no evidence of the children being teased for not attending SRI: [424]–[425]. However, it was also held that '[r]eligious belief was not identified by the decision whether to participate in SRI: [405], [518]', something which would clearly not be the case here given the crucifix is significant to only the Christian faith.

<sup>135</sup> Note that there is no equivalent to the European Convention of Human Rights provision or the similarly worded ICCPR, art 18(4) in the CHHRA 2006.

<sup>136</sup> If there were such a request, similar considerations to those noted below in relation to the limitation of human rights at s 7 of the CHHRA 2006 might be considered.

<sup>137</sup> CHHRA 2006, s 8.

<sup>138</sup> CHHRA 2006, s 8 defines discrimination in terms of its anti-discrimination legislation.

must be accompanied by a cause of action falling outside the bill of rights itself – for example, under the anti-discrimination legislation.

Considering all the possible causes of action available in Australia, it is unlikely that any challenge could successfully be mounted against a public school's display of a crucifix or any other form of religious symbol within their grounds.

Overall, the Australian approach to state freedom from religion can be characterised by the concept of religious equality. The lack of case law on the issue is arguably evidence of the success of this approach more as a political rather than legal project. Full equality has nevertheless proven illusory. Whilst the state permits the funding of religious schools and provides tax breaks to religious institutions, it nevertheless has maintained ties to its Protestant past, with, for example, Christian prayers being said before the start of Federal Parliament and retention of the Queen of England (also head of the Church of England) as head of the Australian executive. This partial equality reflects the approach of the ECtHR adopted in *Lautsi* of accommodating religious symbols as historical artifacts against the backdrop of religious pluralism.

Despite the apparent inspiration that Australian constitutional drafters took from the US First Amendment,<sup>139</sup> Australia has not adopted a strict separation of church and state on the basis of the subtle difference in the wording of the provisions.<sup>140</sup> Whereas the High Court has limited § 116 to legislation with the purpose or effect of establishing religion as an institution of state, the US Supreme Court has traditionally invalidated laws under the First Amendment where they merely 'endorse' religion.<sup>141</sup> Thus, whereas the US Supreme Court has restricted the public funding of religious schools<sup>142</sup> as well as the erection of religious symbols in public schools,<sup>143</sup> the High Court has allowed or would be likely to allow both such state actions.<sup>144</sup> The Australian approach therefore falls closer to the accommodation/pluralistic/secularity approach of the ECtHR than the traditional separation/neutrality/secularism approach traditionally adopted by the US Supreme Court.

## (ii) *Individuals Wearing Religious Symbols in Public Schools*

The lack of express protections from a particular religion being favoured by a State or Territory does not complete the picture as concerns the relationship between the public school system and religion in Australia. This is particularly important given the lack of any comprehensive establishment clause or other protections of the separation of church and state. The corollary of the freedom of the state from religion is the restraint on the state from interfering in religion. This requires analysis of the space created by States or Territories in public spaces for individuals to practise their religion. While there are no recorded cases in Australia of individuals being prohibited from wearing religious

<sup>139</sup> For example, where the First Amendment prohibits laws 'respecting an establishment of religion', § 116 prohibits laws 'for establishing any religion'.

<sup>140</sup> See also, eg, *DOGS case* (n 7 above) 616–17 (Mason J) and 598–603 (Gibbs J) on the distinction between Australian and US constitutional approaches to their respective establishment clauses.

<sup>141</sup> See, eg, *Salazar, Secretary of Interior v Buono*, 567 US \_\_\_ (2012) 8 (Stephen J; Ginsburg and Sotomayor JJ agreeing) (United States).

<sup>142</sup> *Lemon v Kurtzman*, 403 US 602 (1971) (United States). By contrast, indirect funding of religious or 'parochial' schools through school vouchers has been upheld as constitutional: *Zelman v Simmons-Harris*, 536 US 639 (2002) (United States).

<sup>143</sup> *Stone v Graham*, 449 US 39 (1980) (United States) (posting of The Ten Commandments in each Kentucky classroom declared unconstitutional).

<sup>144</sup> See the *DOGS case* (n 7 above) (Commonwealth funding of public schools declared constitutional).

symbols in public schools, the South African Constitutional Court (SACC) recently considered this very point.

In *MEC for Education: Kwazulu-Natal v Navaneethum Pillay*, a public school student of southern Indian heritage was asked to remove her gold nose stud in compliance with the school dress code, which had no provision for granting exemptions, with the school also refusing to exercise its discretion accordingly.<sup>145</sup> An action was brought for discrimination on cultural and religious grounds under anti-discrimination legislation,<sup>146</sup> which implements the protection of equality under section 9 of the South African Constitution.

The SACC made two determinations. First, it held that as the wearing of the nose stud was both a cultural and religious practice,<sup>147</sup> and the practice was of personal significance to the student,<sup>148</sup> both the code and the refusal to grant an exemption were discriminatory,<sup>149</sup> notwithstanding the optional nature of the cultural and religious practice.<sup>150</sup> Secondly, the Court held that the discrimination could not be justified on the basis that it was fair,<sup>151</sup> after it had weighed the subjective, rather than objective,<sup>152</sup> importance of the practice to the student's identity,<sup>153</sup> against the perceived hardship that might be imposed on the school through a drop in discipline and academic or dress standards.<sup>154</sup> There being no undue burden on the school in permitting the student to wear the stud, the school was required to reasonably accommodate her cultural and religious needs.<sup>155</sup>

Although the action was brought under South African anti-discrimination legislation, the heavy influence of the South African Constitution in the SACC's approach again distinguishes an Australian approach to the matter on the basis of its lack of constitutional protection of human rights. On the facts in *Navaneethum Pillay*, because the decision was made by the school authority and not pursuant to any state funding agreement, § 116 of the Australian Constitution would provide no redress.<sup>156</sup> Thus, just as in relation to the display of religious symbols in public schools, the lack of constitutional protections places regulation of such conduct in the hands of the States and Territories, where the weighing of competing rights (characteristic of the SACC's approach) has already been undertaken by their legislatures.<sup>157</sup>

<sup>145</sup> *MEC for Education: Kwazulu-Natal v Navaneethum Pillay* (2008) (1) SA 474 (South Africa).

<sup>146</sup> Equality Act (South Africa), ss 13(2)(a), 14; Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (South Africa), ss 6, 9 (freedom from discrimination), 15 (freedom of religion), 30 (freedom of culture).

<sup>147</sup> *MEC for Education* (n 146 above) [60] (Langa CJ). Nine of the remaining 10 Justices concurred with the entire reasons of the Chief Justice.

<sup>148</sup> *ibid*, [58], [60].

<sup>149</sup> *ibid*, [68] (Lagan CJ), [166] (O'Regan J).

<sup>150</sup> *ibid*, [64]–[65].

<sup>151</sup> Equality Act (South Africa) s 14. The Act draws upon both the equality and limitation clauses of ss 9(5) and 32(1) of the South African Constitution respectively.

<sup>152</sup> *MEC for Education* (n 146 above) [87].

<sup>153</sup> *ibid*, [90].

<sup>154</sup> *ibid*, [79] (Lagan CJ), [181] (O'Regan J).

<sup>155</sup> *ibid*, [112].

<sup>156</sup> The only potential for a remedy would be where there is a legislative ban on a particular religious dress (eg, the burqa), probably under State legislation, and it could be established that it was inconsistent with Commonwealth racial discrimination legislation, which would require that the wearers belonged to a particular race: *Hewitt and Koch* (n 112, above) 20.

<sup>157</sup> *Cobaw* [2014] USCA 75, [472], [511]–[514], [546].



In Australia, there are nevertheless at least three possible protections. First, in some States and Territories dress standards in schools are regulated by legislation.<sup>158</sup> However, given the vagueness of the language and the lack of judicial consideration of such provisions, it is difficult to gauge the extent to which considerations of religious freedom and the factors set out by the SACC would come into play.<sup>159</sup> Australian courts may very well reach a similar conclusion.

Secondly, anti-discrimination legislation might apply to render unlawful the school's refusal to grant an exemption.<sup>160</sup> Whereas in relation to religious symbols hung by schools the focus is on direct discrimination, the application of school policy restricting the wearing of jewellery is applied ostensibly in an equal manner. In these circumstances it is the effect of the conduct which may ground indirect discrimination. Given the disadvantage incurred,<sup>161</sup> the focus of the enquiry turns upon whether such conduct is reasonable,<sup>162</sup> an objective test that requires something more than mere 'convenience' but does not require 'necessity'.<sup>163</sup> The factors to be considered differ from jurisdiction to jurisdiction,<sup>164</sup> and include a test of proportionality broadly analogous to that used by the SACC.<sup>165</sup> Having regard to the determination of proportionality by the SACC and the reasonable accommodation that could be made by creating an exception to the school policy,<sup>166</sup> as well as to the low cost of such measures,<sup>167</sup> an Australian court might arrive at the same result as the SACC.

Finally, as the school is a public authority, the statutory bills of rights might also be invoked.<sup>168</sup> Given the significance of wearing the stud was held to be both religious and cultural in nature,<sup>169</sup> the school's restriction on the student might result in a finding of restraint of freedom to demonstrate religion in observance or practice.<sup>170</sup> However, just as the discriminator bears the burden of proving that the conduct was reasonable under anti-discrimination legislation, the bills of rights provide that reasonable limits may be imposed after fulfillment of a 'proportionality test'.<sup>171</sup> Whether the limitation provisions

<sup>158</sup> Equal Opportunity Act 2010 (Vic), s 42. Note that this provision must be interpreted so far as possible in a manner compatible with the right to freedom of religion at s 14 of the Charter as required by s 32(1) of the Charter.

<sup>159</sup> CHHRA 2006 and common law may assist in the interpretation of the legislation, with the former also assisting in determining the legality of the school's actions (see discussion below in relation to CHHRA 2006).

<sup>160</sup> Note that where there is legislation authorising the school to make dress standards similar to that in Victoria, this might give rise to a defence of statutory authority on the basis that the provision 'authorises' discriminatory conduct (at least where the standard is reasonable): Equal Opportunity Act 2010 (Vic) s 75. Anti-discrimination legislation would subsequently not apply.

<sup>161</sup> The optional nature of the wearing of the stud would also not appear to be a barrier to a determination of disadvantage notwithstanding that the complainant 'can' theoretically comply as 'can' is likely to be interpreted in line with UK authority as meaning 'consistently with . . . customs and cultural conditions': *Mandla v Dowell Lee* [1983] 2 AC 548, 565–66 (United Kingdom).

<sup>162</sup> See the non-exhaustive factors to be considered under the Victorian legislation.

<sup>163</sup> *Secretary, Department of Foreign Affairs v Styles* (1989) 23 FCR 251, 263 (Australia).

<sup>164</sup> For a discussion, see Rees, Lindsay and Rice (n 132 above) 139–44.

<sup>165</sup> See, eg, Equal Opportunity Act 2010 (Vic), s 9(3)(b): 'whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the requirement, condition or practice'.

<sup>166</sup> Equal Opportunity Act 2010 (Vic), s 9(3)(c): 'whether reasonable adjustments or reasonable accommodation could be made . . . [which] would result in less disadvantage'.

<sup>167</sup> Equal Opportunity Act 2010 (Vic), s 9(3)(c): 'the cost of any alternative'.

<sup>168</sup> CHHRA 2006, s 38(1).

<sup>169</sup> *MEC for Education* (n 146 above) [60] (Langa CJ).

<sup>170</sup> CHHRA 2006, s 14(1)(b), (2).

<sup>171</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1291 (Rob Hulls, Att-Gen) (Second reading speech).



are to be taken into consideration in determining the compatibility of the actions of public authorities with human rights remains uncertain, with the High Court split on the role of § 7(2) in determining the compatibility of legislation with human rights.<sup>172</sup> Further difficulties arise as limitations must be prescribed by law,<sup>173</sup> which – according to analogous provisions relating to the freedom of movement under article 12(3) of the ICCPR – require ‘precise criteria’ and ‘may not confer unfettered discretion on those charged with their execution’.<sup>174</sup> In the result then, although there exist distinct differences between the South African and Australian contexts,<sup>175</sup> a Victorian court may well arrive at a similar outcome to that of the SACC, not least because the Victorian limitation provision draws upon the wording of the South African Constitution itself.<sup>176</sup>

Overall, the Australian approach is again close to the accommodation/pluralism/secularity approach to freedom of the state from religion. Unlike symbols displayed by public schools, symbols worn by students do fall under protections provided by Australian legislation. With the bulk of protections across Australian jurisdictions falling under anti-discrimination legislation, the emphasis on equality is perhaps even more evident here, with anti-discrimination and equal opportunity treated as synonyms. The protection of individual religious expression requires a case-by-case weighing of factors, similar to that found in the approach of the ECtHR.<sup>177</sup> Australian courts therefore refrain from applying a strict separation between state and church as can be found in the United States, where there has been little apparent appetite for litigation on the wearing of religious symbols in public places due to the rigidity of the protection of individual religious freedom and freedom of speech provided under the First Amendment.<sup>178</sup>

#### IV. CONCLUSION

Limited constitutional guarantees and a piecemeal legislative anti-discrimination regime, in conjunction with few common law principles, render the protection of religious freedom in Australia complex and haphazard. It firmly places control over the relationship between church and state in the hands of the State and Territory legislatures. Given this tenuous protection coupled with the traditional Australian understanding that the law, let alone, constitutional law, is an inappropriate place for reconciling the church–state relationship, it is perhaps unsurprising that judges have felt little impetus to enter the fray to protect religious freedom.<sup>179</sup> It is this political and legal context – specifically the lack of any entrenched protection for religious freedom or the likelihood of one

<sup>172</sup> *Momcilovic* (n 43 above) [36] (French CJ), [678] (Bell J). cf *ibid*, [574]–[576] (Crennan and Kiefel JJ). Justice Bell extended her analysis directly to s 38 (conduct of public authorities): [681].

<sup>173</sup> CHRR 2006, s 7(2); HRA 2004, s 28(1).

<sup>174</sup> Human Rights Committee, ‘General Comment 27: Freedom of Movement (Art 12)’ (1999) UN Doc CCPR/C/21/Rev.1/Add.9, [13]. See, further, Sarah Joseph, Jenny Schultz and Melissa Castas, *The International Covenant on Civil and Political Rights*, 2nd edn (Oxford, OUP, 2004) 507.

<sup>175</sup> Note the comment by some members of the High Court that little help can be found in South African Constitution: *Momcilovic* (n 43 above).

<sup>176</sup> Department of Justice Victoria (n 57 above) 9.

<sup>177</sup> See, eg, *Leyla Şahin v Turkey* (2007) 44 EHRR 5 (ECtHR).

<sup>178</sup> For a description of the US position, see Ioanna Tourkochoriti, ‘The Burka Ban: Divergent Approaches to Freedom of Religion in France and in the USA’ (2011–12) 20 *William & Mary Bill of Rights Journal* 791, 810–25.

<sup>179</sup> Keith Mason (former President of the New South Wales Supreme Court), ‘Law and Religion in Australia’ (Speech delivered at the National Forum on Australia’s Christian Heritage, Canberra, 7 August 2006).

being enacted – that distinguishes the Australian approach from other national jurisdictions.

The haphazard nature of the approach makes the classification of Australia's position problematic. With respect to the autonomy of religious institutions, Australian legislation requires courts to force open the church door and make limited observations about internal procedures as an exception to the general principle of equality. By contrast, displays of religious symbols in the public sphere rely on a legal or political principle of state equality toward religion – what goes for one should go for all religions. There therefore exists no strict separation between church and state in Australia, with courts usually engaging in a case-by-case weighing of relevant interests to resolve conflicts affecting religious freedom. Allowing for necessary oversimplification of the three sets of dual characterisations considered by McCrudden and Scharffs,<sup>180</sup> the present Australian position more closely approximates to the European accommodation/pluralism/secularity approach than it does the separation/neutralism/secularism tack taken in the United States.

Absent the political will to alter this position, the Australian approach appears unlikely to change. In its recent consultation of 274 individuals representing a range of religions and other world views for its 2011 report into Freedom of Religion and Belief in twenty-first-century Australia, the Australian Human Rights Commission found that many participants believed that Australia provided 'a good working model of freedom of religion and belief that does not need to be changed'.<sup>181</sup> Still, concerns remained over the future direction of the role of religion in society and the approach of government.<sup>182</sup> Such uncertainty must inevitably remain a reality in any system without an entrenched, or even a legislative protection of, fundamental rights and freedoms. Unfortunately it is only when the right or freedom is trammelled on without any recourse to some higher principle that one understands that the lack of protection matters. The findings of the Australian Human Rights Commission are both cause for comfort that Australia seems a place where freedom of religion is a cherished value, and cause for concern in the complacency engendered by such comfort.

<sup>180</sup> McCrudden and Scharffs' introduction ([chapter ten](#) of this volume).

<sup>181</sup> AHRC (n 24 above) 22, 27, 46. cf the finding of the Human Rights and Equal Opportunity Commission (HREOC) in its 1998 report that discrimination on the basis of religion occurred within Australia and that legal protections were inadequate: HREOC, 'Article 18: Freedom of Religion and Belief' (1998) 111.

<sup>182</sup> AHRC (n 24 above) 22.

## Part 5

# Socio-Economic Rights



## *The Emergence and Enforcement of Socio-Economic Rights*

MURRAY WESSON

### I. INTRODUCTION

ONE OF THE most striking developments in human rights law in recent decades has been the increased prominence of socio-economic rights. While there was once little socio-economic rights case law outside India, there is now a stream of jurisprudence from a diverse range of jurisdictions.<sup>1</sup> Similarly, while there was once little scholarship on socio-economic rights, there is now a rapidly expanding literature that is characterised by increasing depth and sophistication.<sup>2</sup> These developments have led Philip Alston to comment that ‘the debate about the justiciability of socio-economic rights has come of age’.<sup>3</sup>

However, notwithstanding this increased attention, much about socio-economic rights remains poorly understood. For example, what explains the rapid emergence of socio-economic rights over the last few decades? How is this development related to broader shifts in the nature of constitutionalism? What is the justification for including socio-economic rights in constitutions? Should socio-economic rights be subject to judicial enforcement? If so, is it possible for socio-economic rights to be enforced by the judiciary in a manner that respects the institutional credentials of the legislature and executive? Finally, what are the likely future trajectories for judicial enforcement of socio-economic rights?

These questions – relating to the emergence and enforcement of socio-economic rights – are explored by four contributors from different perspectives in this Part of the book. In doing so, the authors make reference to a common set of cases as well as one another’s work. This does not mean each chapter makes reference to exactly the same case law, or that each chapter makes reference to all of the other chapters. The authors were provided with a list of ‘paradigm’ socio-economic rights judgments, but for reasons that will become apparent each chapter places greater emphasis on some decisions rather than others. The authors also, of course, discuss decisions beyond those included in the initial case list. The case list therefore functions as a common point of reference rather

<sup>1</sup> For an overview, see Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge, CUP, 2008).

<sup>2</sup> For a recent example, see Jeff King, *Judging Social Rights* (Cambridge, CUP, 2012).

<sup>3</sup> Langford (n 1 above) ix.

than a rigid template. Nevertheless, sufficient overlaps emerge between the chapters for useful comparative lessons to be drawn. Similarly, although the authors had the opportunity to read one another's work, they refer to one another's chapters only where clear points of intersection emerge. But again, illuminating comparative insights can be drawn.

The role of this chapter is to introduce the chapters that comprise the socio-economic rights Part of the book and the case law in light of which they were written. The chapter also attempts to frame the issues that the authors discuss. To this end, this chapter first considers the rapid emergence of socio-economic rights and attempts to locate this development within broader shifts in the nature of constitutionalism. Thereafter, the focus shifts to the judicial enforcement of socio-economic rights and the case law of the South African Constitutional Court, Indian Supreme Court, and courts in the United States. The discussion in these Sections focuses mainly on the positive obligations associated with socio-economic rights but case law addressing the negative duties generated by these rights is also noted. The chapter attempts to draw some general lessons regarding judicial enforcement of socio-economic rights before considering likely trajectories for its future jurisprudential development.

In discussing the case law, the chapter draws a distinction between courts that take a prescriptive approach towards the obligations generated by socio-economic rights ('strong rights'), and courts that take a more deferential approach focused on the justification for the measures adopted by the legislature and executive ('weak rights'). Courts in the former category are willing to prescribe the content of socio-economic rights with a high level of specificity, whereas those in the latter category regard their role in respect of this issue as supervisory. A distinction can also be drawn between open-ended, declaratory forms of relief ('weak remedies') and more time-sensitive, coercive forms of relief ('strong remedies').<sup>4</sup>

In principle, courts need not embrace strong rights *and* strong remedies or weak rights *and* weak remedies in enforcing socio-economic rights. For instance, it is possible for a court to couple a weak specification of the content of a right to a remedy that requires the state to report back to it within a certain timeframe regarding the steps that it has taken to comply with the court's finding.<sup>5</sup> However, in practice, the case law surveyed in this Part of the book would tend to suggest that strong remedies follow strong rights and vice versa. The chapter also argues that the South African Constitutional Court has generally been situated at the weaker end of the spectrum, at least in adjudicating on the positive obligations generated by socio-economic rights. The Indian Supreme Court has oscillated rather unpredictably between both extremes. And, perhaps surprisingly, the case law from the United States is frequently at the stronger, more interventionist, end of the spectrum, despite an unsympathetic political environment and the relative absence of codified socio-economic rights.

This introductory chapter does not seek to argue that there is a single approach to socio-economic rights enforcement that is preferable or universally valid. The term

<sup>4</sup> Rosalind Dixon, 'Creating Dialogue about Socio-Economic Rights: Strong-Form versus Weak-Form Judicial Review Revisited' (2007) 5 *International Journal of Constitutional Law* 391. In drawing these distinctions, Dixon is developing the work of Mark Tushnet. See, for example, Tushnet, 'New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries' (2003) 38 *Wake Forest Law Review* 813.

<sup>5</sup> See further Dixon (n 4 above). This argument is also made in Murray Wesson, 'Grootboom and Beyond: Reassessing the Socio-Economic Rights Jurisprudence of the South African Constitutional Court' (2004) 20 *South African Journal on Human Rights* 284.

‘weak’ is therefore not used in a pejorative sense. Instead, in light of the arguments of the contributors, the chapter attempts to identify the underlying understandings of the judicial role that inform these divergent bodies of case law. Moreover, as Colm O’Cinneide explains in his chapter (fifteen), although the dichotomy between strong and weak rights and remedies is now well-established it might not be adequate to explain the emerging complexity of socio-economic rights case-law. This issue is discussed in the final section of the chapter.

## II. THE EMERGENCE OF SOCIO-ECONOMIC RIGHTS

O’Cinneide commences his chapter by noting that the boundaries between civil and political rights review, on the one hand, and socio-economic rights review, on the other hand, are rapidly crumbling in many parts of the world. This development is, of course, reflected in well-known decisions of the Indian Supreme Court and South African Constitutional Court which are discussed in the sections below. However, the trend identified by O’Cinneide is also reflected in case-law from jurisdictions where socio-economic rights might not be constitutionally protected, but where claims having a socio-economic rights dimension have nevertheless been advanced through a civil and political rights framework. Cases such as these were amongst those provided to the contributors to the socio-economic rights Part of the book.

For example, in *Eldridge v British Columbia*<sup>6</sup> the Canadian Supreme Court found that the failure to provide sign language interpreters for the deaf in public health facilities in British Columbia amounted to discrimination on the basis of physical disability, and therefore breached section 15 of the Canadian Charter of Rights and Freedoms. In reaching this conclusion, the Court emphasised that discrimination can ‘accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public’.<sup>7</sup> Indeed, failure to recognise such an obligation would reflect ‘a thin and impoverished vision of s. 15(1)’.<sup>8</sup>

A further example is *R (Limbuela) v Secretary of State for the Home Department*,<sup>9</sup> where the British House of Lords considered a statutory provision that allowed the Secretary of State to withdraw financial support from asylum seekers who had not claimed asylum as soon as reasonably practicable after arriving in the United Kingdom. Given the statutory prohibition upon asylum seekers taking employment, the effect of this provision was to permit the Secretary of State to force a category of asylum seekers into destitution. The House of Lords did not hesitate in finding that this amounted to a violation of Article 3 of the European Convention (as given effect by the Human Rights Act 1998), the right not to be subjected to torture or inhuman or degrading treatment or punishment. The House of Lords took care to emphasise that a general public duty to house the homeless or provide for the destitute could not be ‘spelled out of article 3’.<sup>10</sup> However, the House of Lords also cautioned against rigidly distinguishing between the

<sup>6</sup> *Eldridge v British Columbia* [1997] 3 SCR 624 (Canada).

<sup>7</sup> *ibid*, para 78.

<sup>8</sup> *ibid*, para 73.

<sup>9</sup> *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66 (United Kingdom).

<sup>10</sup> *ibid*, para 7.



negative and positive obligations associated with Article 3, with Lord Brown observing that '[t]ime and again these are shown to be false dichotomies'.<sup>11</sup>

There is also the highly significant decision of the German Constitutional Court in '*Hartz IV*',<sup>12</sup> in which the Court drew on the principle of human dignity enshrined in Article 1(1) and the social state principle protected in Article 20(1) of the Basic Law to recognise a right to a dignified minimum existence. The Court assessed the constitutionality of the provisions governing the *Hartz IV* benefits in light of this finding. It specified procedural requirements for the legislature to determine these benefits, namely, a procedure that is needs-oriented and realistic, based on reliable data, and transparent. Given these requirements, the Court found that the *Hartz IV* legislation was unconstitutional.

What explains these rapid developments relating to socio-economic rights in many different parts of the world? There is a familiar, although rather limited, story that goes as follows. Following the recognition of socio-economic rights in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, socio-economic rights became caught up in Cold War rivalries which meant that they were largely neglected in the domestic arena, at least outside India. However, with the end of the Cold War, and the inclusion of socio-economic rights in constitutions such as the Constitution of South Africa, socio-economic rights became the subject of renewed global interest.

However, this familiar narrative ignores how the emergence of socio-economic rights reflects broader shifts in the nature of constitutionalism. On this issue, at least two accounts are available in the literature. The first explanation, discussed by O'Cinneide in his chapter (fifteen), relates to the emergence of what Kai Möller – the sub-editor of the proportionality Part of this book – terms a 'global model of constitutional rights'.<sup>13</sup> In Möller's view, the global model of constitutional rights stands in contrast to the dominant philosophical account of fundamental rights. The dominant philosophical account holds that rights: cover only a limited domain by protecting certain especially important interests of individuals; impose exclusively or primarily negative obligations on the state; operate only between the citizen and the government, not between private citizens; and enjoy special normative force which means that they can be outweighed, if at all, only under exceptional circumstances.<sup>14</sup>

In contrast, the global model of constitutional rights, originating in decisions of the German Constitutional Court and the European Court of Human Rights but also reaching to jurisdictions such as South Africa and Canada, regards rights as premised on the value of 'positive freedom', or 'autonomy', or 'the control an individual has over her own life'.<sup>15</sup> The result is a rejection of all four elements of the received philosophical account of rights and an embrace of a model of rights that includes rights inflation, posi-

<sup>11</sup> *ibid*, para 92.

<sup>12</sup> BVerfG, 1 BvL 1/09, Judgment of 9 February 2010 (*Hartz IV*) (Germany). See also BVerfG, 1 BvL 10/10, Judgment of 18 July 2012 (*Asylum Seekers Benefits* case) (Germany). In the latter case, the German Constitutional Court found that the Asylum Seekers Benefit Act was incompatible with the fundamental right to a dignified minimum existence. This is because the benefits had not been changed since 1993 despite considerable increases in the cost of living in Germany. Furthermore, the amounts provided had not been determined on the basis of a realistic, needs-oriented methodology. For discussion of *Hartz IV* and the *Asylum Seekers Benefits* case see Inga Winkler and Claudia Mahler, 'Interpreting the Right to a Dignified Minimum Existence: A New Era in German Socio-Economic Rights Jurisprudence?' (2013) 13 *Human Rights Law Review* 388.

<sup>13</sup> K Möller, *The Global Model of Constitutional Rights* (Oxford, OUP, 2012).

<sup>14</sup> *ibid*, 2.

<sup>15</sup> *ibid*, 30.

tive obligations and socio-economic rights, horizontal effect, and proportionality.<sup>16</sup> Socio-economic rights are amongst the preconditions of autonomy and therefore emerge not as an isolated development but as an aspect of broader developments in the nature of constitutionalism.

An alternative explanation regards socio-economic rights as arising from a ‘constitutionalism of the Global South’.<sup>17</sup> David Bilchitz – also a contributor to the proportionality Part of this book (chapter three) – argues that older ‘Northern’ Bills of Rights, such as the French Declaration on the Rights of Man and of the Citizen and the amendments to the US Constitution, emphasise an ideal of negative freedom, inasmuch as they arose from political repression and a struggle against the deprivation of liberty.<sup>18</sup> In contrast, the newer ‘Southern’ constitutions such as those of India, South Africa, and Colombia are more centrally concerned with matters of distributive justice, given the challenges of poverty and inequality that exist in those jurisdictions. The constitutions of these jurisdictions are also sometimes termed ‘transformative’, given that they are directed towards ‘transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction’.<sup>19</sup> In Bilchitz’s view, the inclusion of socio-economic rights in such constitutions has highlighted an omission in the constitutions of the ‘North’, or what O’Cinneide terms a ‘social rights problematic’, whereby the absence of legal protection of such rights is increasingly viewed as constituting a defect or lacuna within a national constitutional order.<sup>20</sup>

These two accounts are, of course, potentially complementary. Both sets of developments are underpinned by a positive conception of freedom, but different emphases exist in different parts of the world. As noted, in Möller’s view the key features of contemporary constitutionalism are rights inflation, positive obligations and socio-economic rights, horizontal effect, and proportionality. The transformative constitutions of the Global South, in contrast, are more clearly oriented towards the alleviation of inequality and disadvantage, and include substantive equality provisions geared towards the alleviation of group-based disadvantage and procedural innovations designed to facilitate the representation of disadvantaged sectors of society. But on both accounts, the fundamental point should be clear, which is that the emergence of socio-economic rights needs to be understood as part of a broader shift in the nature of constitutionalism, away from the protection of a core set of basic liberties towards a more comprehensive vision of the socially just society. O’Cinneide therefore refers to ‘new strains of constitutionalism’ which have put down particularly strong roots in the democracies of the Global South.<sup>21</sup>

These developments raise difficult questions about the appropriate domain of constitutional justice – in the sense of the extent to which constitutions can seek to address issues of social justice – and the role of the courts in giving effect to provisions such as socio-economic rights. The remainder of the chapter focuses on the latter issue in particular.

<sup>16</sup> *ibid.*, 1–15.

<sup>17</sup> See, for example, Daniel Bonilla Maldonado (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge, CUP, 2013).

<sup>18</sup> D Bilchitz, ‘Constitutionalism, the Global South, and Economic Justice’ in Maldonado (n 17 above) 45–46.

<sup>19</sup> Karl Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146, 150.

<sup>20</sup> C O’Cinneide (chapter fifteen of this volume) p 308.

<sup>21</sup> C O’Cinneide (*ibid.*) p 310.

## III. SOUTH AFRICA AND THE CULTURE OF JUSTIFICATION

As Justice Edwin Cameron notes in his chapter (sixteen), many of the objections to constitutional recognition and judicial enforcement of socio-economic rights echo the debate in South Africa at the time its constitution was adopted. In Cameron's view, the two key objections to socio-economic rights are that courts lack sufficient capacity and democratic legitimacy to enforce socio-economic rights claims.

As Cameron also notes, these issues were debated during the Constitution drafting process by Dennis Davis and Etienne Mureinik. Davis argued *inter alia* that judicial enforcement of socio-economic rights entails policy choices, and for this reason judicial interpretation of socio-economic rights is less predictable than that of civil and political rights because the 'background norms' are less contested when it comes to civil and political rights.<sup>22</sup>

Mureinik responded by conceding that the positive obligations associated with socio-economic rights can be realised in various ways and that courts lack the expertise and legitimacy to decide between them. However, Mureinik contended that socio-economic rights review could nevertheless focus on the justification for the measure in question. In this way, it would be possible for courts to hold government to account while also not placing themselves in the position of primary decision-makers. But for this to be achieved, the standard of review in socio-economic rights cases should focus on sincerity and rationality and therefore be set at a relatively deferential level.<sup>23</sup>

In making this argument, Mureinik was drawing on an idea that he would later develop into perhaps the most cited observation in South African constitutional law scholarship: 'if the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification'.<sup>24</sup> David Dyzenhaus has since been prominent in developing Mureinik's notion of judicial review as facilitating a culture of justification: 'what justifies all public power is the ability of its incumbents to offer adequate reasons for the decisions which affect those subject to them . . . The courts' special role is as an ultimate enforcement mechanism for such justification'.<sup>25</sup> And more recently, Sandra Fredman has drawn on Dyzenhaus's work to argue that courts can play a role in the enforcement of socio-economic rights without undermining democracy by furthering the democratic value of accountability. In Fredman's view, judicial review achieves this by requiring elected representatives to 'explain and justify their actions to the electorate on the basis of arguments that are acceptable to all'.<sup>26</sup>

Of course, like the 'global model of constitutional rights' and 'transformative constitutionalism', the 'culture of justification' is associated with an expansive jurisdiction for the courts. Jeff King, the final contributor to the socio-economic rights Part of this book, has argued elsewhere that the necessary corollary of an expanded jurisdiction is a theory

<sup>22</sup> D Davis, 'The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 *South African Journal on Human Rights* 475, 484.

<sup>23</sup> E Mureinik, 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *South African Journal on Human Rights* 464.

<sup>24</sup> E Mureinik, 'A Bridge to Where?: Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31, 32.

<sup>25</sup> D Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in Michael Taggart (ed), *The Province of Administrative Law* (Oxford, Hart Publishing, 1997) 305.

<sup>26</sup> S Fredman, *Human Rights Transformed: Positive Duties and Positive Rights* (Oxford, OUP, 2008) 103.

of deference.<sup>27</sup> Indeed, one might argue that a measure of deference is entailed by the very idea of the culture of justification or a rationale for justiciability that is premised on the notion of accountability. Dyzenhaus, for example, argues that a distinction can be drawn between a standard that asks whether a decision is justifiable (whether it is defensible) and one that asks if it is justified (whether it coincides with the decision that the judge would have given).<sup>28</sup> Mureinik's argument in his seminal article on socio-economic rights review was effectively that if courts applied the latter standard they would cease to be forums of accountability and instead place themselves in the position of primary decision-makers.<sup>29</sup>

King's response to the need for a theory of deference is to advocate an 'institutional' approach to judicial restraint. Institutional approaches focus on the advantages and disadvantages of the judicial process as an institutional mechanism for solving problems. Institutional approaches to restraint therefore put emphasis on the problems of uncertainty and judicial fallibility, on the systemic impact of court rulings, on rights as prima facie entitlements subject to balancing rather than as trumps over collective welfare, and on inter-institutional comity and collaboration.<sup>30</sup> The result is that institutional approaches tend to advocate 'a somewhat modest, case-by-case and incrementalist role for the courts in public law adjudication'.<sup>31</sup> Furthermore, returning to the distinction drawn in the introduction to this chapter, it is not ordinarily the role of the courts to adopt a 'strong rights' approach that prescribes the exact content of the obligations generated by rights. King argues that courts should instead focus on 'the process of decision-making in respect of the asserted human rights interest, rather than on the state's achievement of some particular state of affairs'.<sup>32</sup> The obligations associated with rights therefore emerge through a process of inter-institutional dialogue between the different branches of government.

It is arguable that the South African Constitutional Court case law on the positive obligations generated by socio-economic rights has been guided by such considerations from the outset. The key decisions in this regard were included in the case-list for this Part of the book. For example, in the early case of *Soobramoney v Minister of Health, KwaZulu-Natal*<sup>33</sup> the Constitutional Court found that the right of access to health care services in section 27(a) of the Constitution did not entitle the appellant to life-saving treatment for chronic renal failure. In reaching this decision, Chaskalson P held that '[a] court will be slow to interfere with rational decisions taken in good faith by political organs and medical authorities whose responsibility it is to deal with such matters'.<sup>34</sup>

In the landmark case of *Government of the Republic of South Africa v Grootboom*,<sup>35</sup> the Constitutional Court found that the right of access to housing in section 26 of the Constitution meant that the state housing programme was unconstitutional to the extent

<sup>27</sup> J King, 'Institutional Approaches to Judicial Restraint' (2008) 28(3) *Oxford Journal of Legal Studies* 409, 441.

<sup>28</sup> D Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 *South African Journal on Human Rights* 26.

<sup>29</sup> See further Murray Wesson, 'Disagreement and the Constitutionalisation of Social Rights' (2012) 12 *Human Rights Law Review* 221.

<sup>30</sup> King (n 2 above) 136–40.

<sup>31</sup> *ibid.*, 121.

<sup>32</sup> *ibid.*, 107.

<sup>33</sup> *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (South Africa).

<sup>34</sup> *ibid.*, para 29.

<sup>35</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (South Africa).

that it failed to make sufficient provision for people in immediate and desperate need of housing. In *Grootboom*, the Court adopted the reasonableness standard for enforcement of socio-economic rights and explained its role as follows:

A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations.<sup>36</sup>

The Court therefore did not specify the exact steps that the state should take to realise its constitutional obligations, nor the exact content of the right of access to housing. The Court also declined to adopt a 'minimum core' approach that would have entailed the Court specifying that socio-economic rights have a minimum core that should be realised as a matter of priority, or that everyone in the position of the litigants should be entitled to relief.<sup>37</sup> The Court's weak rights approach was coupled to a weak remedy in the form of a declaratory order in favour of the litigants.

In the subsequent case of *Minister of Health v Treatment Action Campaign*,<sup>38</sup> the Constitutional Court held that the right of access to health care services in section 27(a) of the Constitution required the Government to make the anti-retroviral drug Nevirapine, and testing and counselling facilities, available throughout the public health sector. In *Treatment Action Campaign*, the Court again declined to adopt a minimum core approach to socio-economic rights finding that:

The Constitution contemplates . . . a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of such measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way, the judicial, legislative and executive functions achieve appropriate constitutional balance.<sup>39</sup>

Although the Court's remedy was more prescriptive and in that sense stronger than in *Grootboom* it was also declaratory in form. Indeed, the Court expressly declined to follow the example of the High Court and issue a structural interdict that would have required the government to submit its revised policy to the Court after a specified period of time.<sup>40</sup>

Most recently, in *Mazibuko v City of Johannesburg*<sup>41</sup> the Constitutional Court considered the constitutionality of a policy whereby pre-paid water meters were introduced into a poor area of Soweto, with the eventual aim of installing such meters throughout Soweto.<sup>42</sup> The applicants challenged this policy on various grounds, including that the

<sup>36</sup> *ibid*, para 41.

<sup>37</sup> The Constitutional Court's reluctance to embrace a minimum core approach in *Grootboom* and subsequent cases has generated an extensive literature. In South Africa, the best known elaboration and defence of the minimum core is David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford, OUP, 2007). For a contrasting view, including citations to other scholars sceptical of the minimum core, see Mark Kende, *Constitutional Rights in Two Worlds: South Africa and the United States* (Cambridge, CUP, 2009) 243–85.

<sup>38</sup> *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) (South Africa).

<sup>39</sup> *ibid*, para 38.

<sup>40</sup> *ibid*, para 129.

<sup>41</sup> *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) (South Africa).

<sup>42</sup> For a full overview of facts, see Murray Wesson, 'Reasonableness in Retreat? The Judgment of the South African Constitutional Court in *Mazibuko v City of Johannesburg*' (2011) 11 *Human Rights Law Review* 390.

Constitutional Court should determine that the content of the right to sufficient water in areas such as Phiri is 50 litres per person per day. The Court rejected this submission and endorsed a weak rights approach as follows: ‘ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right’.<sup>43</sup> The Court also appeared to endorse Mureinik’s concept of the culture of justification, and the subsequent work of Dyzenhaus and Fredman, by emphasising that it understands its role in socio-economic review as deepening democracy through enhanced accountability:

A reasonableness challenge requires government to explain the choices it has made . . . If the process followed by government is flawed or the information gathered is obviously inadequate or incomplete, appropriate relief may be sought. In this way, the social and economic rights entrenched in our Constitution may contribute to the deepening of democracy. They enable citizens to hold government accountable not only through the ballot box but also, in a different way, through litigation.<sup>44</sup>

There is clearly much that is attractive about a model of socio-economic rights review that is based on reasonableness and accountability, and the weak rights and weak remedies jurisprudence that has developed from these premises. Socio-economic rights are an area where the judiciary’s capacity and legitimacy are especially limited. But as Cameron argues in his chapter (sixteen), through the reasonableness standard the Constitutional Court appears to have acknowledged these limitations while also requiring ‘continual review, close scrutiny of government programmes, insistence on attention to the poorest, but leaving a wide margin for democratic institutions to shape the content of the rights within the mandate the voters confer’.<sup>45</sup>

However, for the many critics of the Constitutional Court’s socio-economic rights case law the reasonableness standard threatens to drain socio-economic rights of their substantive content and reduce them to mere procedural requirements. Paul O’Connell, for example, describes *Mazibuko* as representing ‘a recasting of the socio-economic rights guarantees as some form of hyper-procedural requirement, rather than a guarantee of substantive material change’.<sup>46</sup>

In a similar vein, Bilchitz criticises the Court’s approach to socio-economic rights in *Mazibuko* as follows:

instead of suggesting concrete entitlements for individuals that guarantee a minimum level of social justice, the Court renders them simply requirements upon the government to explain, in a very weak manner, what it is doing in a particular area. Socio-economic rights thus become entitlements to an explanation.<sup>47</sup>

<sup>43</sup> *Mazibuko* (n 41 above) para 60.

<sup>44</sup> *ibid.*, para 71.

<sup>45</sup> E Cameron (chapter sixteen of this volume) p 330.

<sup>46</sup> P O’Connell, ‘The Death of Socio-Economic Rights’ (2011) 74 *Modern Law Review* 532, 552. My view is that the Constitutional Court was correct in *Mazibuko* not to give precise content to the right of access to sufficient water. However, the decision is nevertheless unpersuasive on the issue of the compatibility of the challenged policy with municipal by-laws and national primary legislation and in its application of the constitutional equality right. See Wesson (n 42 above).

<sup>47</sup> Bilchitz, ‘Constitutionalism, the Global South, and Economic Justice’ in DB Maldonado (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge, CUP, 2013) 73.



In contrast to King's emphasis on courts reviewing the process of decision-making and the content of socio-economic rights emerging through a process of inter-institutional dialogue, Bilchitz contends that the Constitutional Court's 'weak approach to specifying the content of these rights means that neither individuals, courts, nor other branches of government understand what level of provision is required by these rights'.<sup>48</sup> Bilchitz argues further that the Court's failure to give specific content to socio-economic rights undermines the ultimate point of a constitution, which is to provide a framework for the policies and actions of the legislature and executive.<sup>49</sup> In addition to advocating a strong rights approach, Bilchitz has urged the Court to grant stronger remedies in socio-economic rights cases.<sup>50</sup>

The section that follows considers case law from India and the United States where the courts have embraced strong rights and strong remedies in enforcing the positive dimensions of socio-economic rights. This case law allows for consideration of the advantages and disadvantages of the approach urged by critics of the South African Constitutional Court.

However, before considering this case law it is necessary briefly to note the Constitutional Court's important case law regarding the negative obligations generated by socio-economic rights. The Court has been willing to embrace stronger remedies in these decisions. For example, the case-list for the socio-economic rights Part of the book includes *Occupiers of 51 Olivia Road v City of Johannesburg*,<sup>51</sup> which concerned the eviction of more than 400 occupiers from two buildings in the inner city of Johannesburg. As Cameron explains in his chapter (sixteen), the Constitutional Court ordered the City and the applicants to engage 'meaningfully' with one another in an effort to resolve their differences. The result was that the occupiers and the City concluded an agreement that set out measures to be taken to render the buildings safer and more habitable. The City also agreed to provide the occupiers with alternative accommodation pending permanent housing solutions. Cameron writes that the Court's order proved successful and 'has also proven beneficial in other cases where seemingly intractable and acrimonious disputes between parties turn out to be soluble when they engage with one another'.<sup>52</sup>

#### IV. INDIA, THE UNITED STATES, AND THE PROMISE OF JUDICIAL ACTIVISM

Anashri Pillay reviews the socio-economic rights case law of the Indian Supreme Court in her chapter (seventeen). The Indian Supreme Court is often regarded as an exemplar of judicial activism. However, Pillay reveals that the record of the Court is in fact more chequered and that it has oscillated between a weak and strong approach to socio-economic rights and remedies.

The case-list for this Part of the book includes examples of the Indian Supreme Court's activism. For instance, the case of *People's Union for Civil Liberties v Union of India*<sup>53</sup> was brought by the People's Union for Civil Liberties in an attempt to force the government to

<sup>48</sup> *ibid.*, 76.

<sup>49</sup> *ibid.*, 88.

<sup>50</sup> See, for example, Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socioeconomic Rights Jurisprudence' (2003) 19 *South African Journal on Human Rights* 1.

<sup>51</sup> *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 (3) SA 208 (CC) (South Africa).

<sup>52</sup> E Cameron (chapter sixteen of this volume) p 332.

<sup>53</sup> In the Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No 196 of 2001.



take steps to ensure the effective implementation of the food distribution schemes created by the Famine Code. The Court handed down a series of interim orders that exhibited a strong approach to rights and remedies. For instance, the Court ordered that every child in every government, and government-assisted, primary school should be provided with a cooked midday meal, and stipulated detailed criteria that the meal should meet.<sup>54</sup> The Court also ordered the government to complete the identification of people who fell into the groups targeted for food distribution, issue cards to allow these people to collect grain, and distribute grain to the relevant centres.

Similarly, in *State of Bihar v Project Uchcha Vidya, Sikshak Sangh*,<sup>55</sup> in the context of the right to education, the Indian Supreme Court ordered that a committee be appointed to investigate departures from the State of Bihar's policy concerning the establishment of 'Project Schools' aimed at improving its poor education record. The Court included details as to the composition and functions of the committee, guidelines as to what would constitute irregularities in the implementation of the policy, and an expectation that the State of Bihar would take remedial action if the committee found any irregularities. This contrasts with the South African Constitutional Court's insistence in *Grootboom* that 'a wide range of possible measures could be adopted by the state to meet its obligations'<sup>56</sup> and the declaratory order that it granted.

Turning to the negative obligations generated by socio-economic rights, there is also the celebrated case of *Olga Tellis v Bombay Municipal Corporation*.<sup>57</sup> The petitioners were slum and pavement-dwellers living in impoverished conditions in Bombay. The state evicted some of the residents but they returned to their original dwelling sites because they needed to be close to their places of work. The Court drew on the directive principles in the Indian Constitution regarding the right to work and the right to a livelihood and found that the state had to follow a fair, just and reasonable procedure before depriving a person of these rights. The petitioners should therefore have been given a hearing, although this omission had been remedied by the proceedings before the Court. In the event, given the deplorable conditions of the slums the Court found that the decision to evict was reasonable.

However, Pillay reaches beyond decisions such as these to demonstrate that in other cases the Indian Supreme Court has adopted a far more deferential approach. For example, *Almitra H Patel v Union of India*<sup>58</sup> addressed the implementation of statutory duties aimed at cleaning up the city of Delhi. Pillay argues that Justice Kirpal exhibited a striking lack of concern for the plight of slum-dwellers by finding that '[r]ewarding an encroacher on public land with a free alternate site is like giving a reward to a pickpocket'.<sup>59</sup> Pillay likewise argues that in *Narmada Bachao Andolan v Union of India*<sup>60</sup>

<sup>54</sup> The Supreme Court held that the midday meal should ensure a minimum content of 300 calories and 8–12 grams of protein each day of school for a minimum of 200 days per year. In the same order, the Court stipulated that as part of the 'Integrated Child Development Scheme' each child up to six years of age should be provided with 300 calories and 8–10 grams of protein; each adolescent girl 500 calories and 20–25 grams of protein; each pregnant woman and nursing mother 500 calories and 20–25 grams of protein; and each malnourished child 600 calories and 16–20 grams of protein. See Order dated 28 November 2001, in WP(C) No 196/2001 (*People's Union for Civil Liberties v Union of India*).

<sup>55</sup> *State of Bihar v Project Uchcha Vidya, Sikshak Sangh*, Appeal (civil) 6626-6675 of 2001 (India).

<sup>56</sup> *Grootboom* (n 35 above) para 41 (South Africa).

<sup>57</sup> *Olga Tellis v Bombay Municipal Corporation*, AIR 1986 SC 180 (India).

<sup>58</sup> *Almitra H Patel v Union of India* AIR 2000 SC 1256.

<sup>59</sup> *ibid*, 4.

<sup>60</sup> *Narmada Bachao Andolan v Union of India* (2000) 10 SCC 664 (India).

the Supreme Court applied a high level of deference in approving a large-scale forced eviction in the absence of compliance with statutory requirements for environmental clearance and adequate measures to secure the rehabilitation of displaced persons.

Pillay goes on to suggest that it is possible to identify some common themes in the Supreme Court's case law. For example, as in many jurisdictions, judicial action in this area is most effective when part of a broader, well-organised civil society struggle to ensure access to socio-economic goods. Success in socio-economic rights litigation has also often been achieved against a background of pre-existing governmental commitments and where the resource implications of a successful claim are limited. Nevertheless, Pillay's overall conclusion is that an examination of the case law leaves one with a sense of 'radical inconsistency'.<sup>61</sup>

This unpredictability may be partly due to the structure of the Indian Supreme Court. Pillay explains that there are currently 30 justices on the bench. Relaxed standing rules and a liberal approach to admissibility have resulted in a high volume of litigation with many judgments handed down by two-judge Division Benches. Courts and counsel are unable to keep pace with the growth of precedent, which leads to inconsistency in the law. The result is that the Indian Supreme Court seems to lack a principled basis to distinguish between cases where it should intervene and where it should not.<sup>62</sup> This contrasts with the South African Constitutional Court, which sits as a single bench and whose judgments are grounded in a clear – although as we have seen not uncontested – understanding of the judicial role.

A more surprising example of judicial activism in the enforcement of socio-economic rights can be found in various judgments from the United States. The example is surprising because as King explains in his chapter (eighteen), the United States is exceptional among similarly wealthy nations for its low public commitment to securing adequate socio-economic assistance for its citizens. One might expect this political attitude to translate into judicial hostility towards social welfare claims.

The example is also surprising because there are well-known examples of the US Supreme Court declining to interpret the US Constitution as a vehicle for social welfare claims. For instance, the case-list for the socio-economic rights Part of this book includes *San Antonio Independent School District v Rodriguez*,<sup>63</sup> where it was argued that the Texan system of funding schools based on local property taxes violated the equal-protection clause of the Fourteenth Amendment. Given disparities in the value of property, this system led to significant differences in levels of local expenditure on education. As King explains, in upholding the constitutionality of the system the Supreme Court found that '[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution'.<sup>64</sup> Furthermore, '[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws'.<sup>65</sup>

Similarly, in *DeShaney v Winnebago County Department of Social Services*<sup>66</sup> the petitioner was a young boy who had been seriously beaten by his father. He and his mother

<sup>61</sup> A Pillay (chapter 17 of this volume) p 351.

<sup>62</sup> Bilchitz (n 47 above) 82. See further Fredman (n 26 above) 142.

<sup>63</sup> *San Antonio Independent School District v Rodriguez*, 411 US 1 (1973) (United States).

<sup>64</sup> *ibid*, 33.

<sup>65</sup> *ibid*, 35.

<sup>66</sup> *DeShaney v Winnebago County Department of Social Services*, 489 US 189 (1989) (United States).

sued the Department of Social Services under a federal statute bearing on the denial of constitutional rights. He claimed that by failing to protect him the Department had denied him the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment. In rejecting this claim the Supreme Court held:

The Clause is phrased as a limitation of the State's power to act, not as a guarantee of certain minimal levels of safety and security . . . its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means . . . Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid.<sup>67</sup>

However, King argues that cases such as these are only part of the picture of socio-economic rights enforcement in the US legal system. There are, first, well-known decisions of the Warren Court such as *Goldberg v Kelly*,<sup>68</sup> in which it was held that the Due Process Clause of the Fourteenth Amendment gives welfare recipients a right to a hearing before their benefits are terminated. Even though the Burger Court subsequently retreated from some of the decisions of the Warren Court, it remains the case that 'American judges often enforce obligations to provide social welfare services in a manner that is strikingly interventionist by comparison with most other wealthy states'.<sup>69</sup> This can be demonstrated by surveying some of the other US decisions included in the socio-economic rights case-list.

For example, the *Campaign for Fiscal Equity v New York* litigation commenced when the Campaign for Fiscal Equity filed a claim in 1993 and ended in 2006 when the New York Court of Appeals ordered the State to spend an additional US\$1.93 billion per annum to remedy educational inequality in New York's public school system. In his chapter, King provides an overview of this complex series of cases. In light of the distinction drawn at the outset of this chapter, the willingness of the New York courts to adopt a strong rights approach warrants emphasis. For instance, in the first major case, *CFE I*, the New York Court of Appeals found that the education article in the New York Constitution requires the State to offer all children the opportunity of a 'sound basic education'. The Court was willing to specify the content of a 'sound basic education' in a manner analogous to the Indian Supreme Court in the Right to Food litigation.<sup>70</sup> In subsequent litigation, the New York courts also demonstrated a willingness to specify the level of the State's spending obligations. King explains that the Appellate Division, for instance, 'directed' the legislature to 'consider' an annual funding increase of between US\$4.7 billion and US\$5.63 billion. The Court also ordered the legislature to provide US\$9.179 billion for a one-off capital improvement spending programme. This decision was reversed by the Court of Appeals but the contrast with the more

<sup>67</sup> *ibid*, 195–96.

<sup>68</sup> *Goldberg v Kelly*, 397 US 254 (1970) (United States).

<sup>69</sup> J King (chapter eighteen of this volume) p 358.

<sup>70</sup> The New York Court of Appeals found that the education article 'requires the State to offer all children the opportunity of a sound basic education', consisting of 'the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury', as well as 'minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn', 'minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks', and 'minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas'. This series of quotations is taken from *Campaign for Fiscal Equity v State of New York*, 8 NY 3d 14 (Ct App 2006) (United States).

deferential approach adopted by the South African Constitutional Court should nevertheless be obvious.

Included in the case-list are other examples of judicial activism by US courts in the enforcement of social welfare claims. In *Montoy v State of Kansas*,<sup>71</sup> for example, the Kansas Supreme Court affirmed the finding of a trial court that the State education finance system violated the Kansas Constitution. The Court issued a coercive, time-sensitive remedy by setting an April deadline for remedial action by the legislature. The legislature acted by the deadline, but enacted legislation that provided substantially less funding than the amount deemed necessary by a 2002 financial study that the State had commissioned. The plaintiffs returned to the Court, which found that the amount provided by the legislature was insufficient. As in the *CFE* litigation, the Kansas Supreme Court demonstrated a willingness to specify the level of the State's spending obligations by ordering the legislature to provide US\$290 million, the amount that the study had recommended for the first year of a multi-year spending programme. King notes that in per capita terms this order was probably as consequential for Kansas as the *CFE* litigation was for the State of New York.

King offers two explanations for why America has produced this unusual mixture of a low public commitment to public spending and comparatively robust judicial interventionism. The first is that in the United States there is a greater reluctance to engage in balancing of constitutional rights, and a more prevalent view that rights are trumps that are resistant to trade-offs. King argues that this leads American courts 'on the one hand to draw the circle of rights more narrowly, but on the other to extend very potent protection to those interests that are constitutionally deemed rights'.<sup>72</sup>

Secondly, King explains that in many of the US cases there appears to be a breakdown of inter-institutional collaboration between the judiciary, executive and legislature. In many jurisdictions, King argues, there is good faith political acceptance of the need for a well-functioning, reasonably well-funded, and fairly administered welfare state. But in many of the US cases bureaucracies are obstructionist and welfare services underfunded. Drawing on the work of Neil Komesar, King argues that the demand-side pressures produced by chronic failings in one institution may result in reliance and a need for responsiveness from other institutions, such as the courts.<sup>73</sup> King suggests that this may also explain the activist socio-economic rights decisions of the Indian Supreme Court and the basic structure doctrine developed by the Court in a series of cases discussed by Pillay in her chapter. Cameron, in contrast, emphasises that in his view the South African political context is not one 'where the government is either unwilling or utterly unresponsive to the need for the delivery of basic social goods'.<sup>74</sup> By implication, the strong rights and strong remedies approach of the US courts, and on occasion the Indian Supreme Court, is inappropriate in the South African context.

The second irony identified by King is that the interventionist approach of the US courts 'has generated quite ambivalent reactions by numerous well-informed commentators who see the value of a stronger American welfare state'.<sup>75</sup> King points to some

<sup>71</sup> *Montoy v State of Kansas*, 278 Kan 769, 102 P 3d 1160 (Kan 2005) (United States).

<sup>72</sup> J King (chapter eighteen of this volume) p 374.

<sup>73</sup> NK Komesar, *Law's Limits: The Rule of Law and the Supply and Demand of Rights* (Cambridge, CUP, 2001) 23.

<sup>74</sup> E Cameron (chapter sixteen of this volume) p 333.

<sup>75</sup> J King (chapter eighteen of this volume) p 358.

potentially good results of judicial interventions but notes that in many cases there have been a poor administrative responses, gains have been blunted by political backlash, and the problems of scarcity and polycentricity mean that increases in spending in some areas have been accompanied by decreases in other social spending. King points to further negative consequences of litigation such as defensive behaviour on the part of public servants, lengthy litigation periods with unclear political accountability, fragmentation of policy efforts, and uncertainty and disruption. In short, the promise of judicial activism held out by the Indian and US decisions, and urged by critics of the South African Constitutional Court, may in fact be a false promise.

In his recent book *Judging Social Rights*, King argues that the capacity of well-intentioned judicial interventions to produce uncertain consequences or even worsen the functioning of welfare bureaucracies means that the constitutionalisation of socio-economic rights is a 'risky enterprise'.<sup>76</sup> As explained in the discussion of the South African case law, this leads King to advocate a theory of deference rooted in an 'institutional' approach to judicial restraint. This forms the basis of King's central recommendation in *Judging Social Rights*, which is that courts should adopt an 'incrementalist' approach to socio-economic rights adjudication. By this King means that courts should avoid judgments that generate significant, nationwide allocative impact. Courts should instead give decisions on narrow, particularised grounds or, where far-reaching implications are unavoidable, decide cases in a manner that preserves flexibility. It follows that judicial decision-making should 'ordinarily proceed in small steps, informed by past steps, and small steps might affect large numbers of people, but in ways that preserve latitude for adaptation'.<sup>77</sup>

Of course, this is very much how the South African Constitutional Court has developed its socio-economic rights jurisprudence. Cameron, for instance, argues that 'the Constitutional Court's incremental approach to developing the reasonableness standard casuistically is justified'.<sup>78</sup> It is not surprising that King is generally positive about the Constitutional Court's socio-economic rights case law.<sup>79</sup> Nevertheless, this conclusion returns us to the frustrations voiced by critics of the South African Constitutional Court and their sense that caution and incrementalism fail to realise the potential of socio-economic rights to deliver meaningful social change.

## V. THE FUTURE OF SOCIO-ECONOMIC RIGHTS JURISPRUDENCE

In light of this discussion, it is not surprising that much of the academic debate about socio-economic rights has involved consideration of the relative merits of weak and strong rights and remedies. Many commentators have also tended to assume that there

<sup>76</sup> King (n 2 above) 8.

<sup>77</sup> King (n 2 above) 293. For discussion, see Murray Wesson, 'Enforcing Human Rights Incrementally: Review of Jeff King, *Judging Social Rights* (Cambridge, Cambridge University Press, 2012)' (2012) 16 *University of Western Sydney Law Review* 127.

<sup>78</sup> E Cameron (chapter sixteen of this volume) p 337.

<sup>79</sup> King, for instance, describes the Constitutional Court as an 'exemplar' of the need for courts to accommodate administrative and legislative flexibility in their enforcement of socio-economic rights. See King (n 2 above) 281. However, King is also not uncritical of the Court's case law. He argues that the fiscal impact of the Court's decision in *Khosa v Minister of Social Development* (2004) 6 BCLR 569 (CC) (South Africa) was excessive. See King (n 2 above) 319. He also has doubts about the Court's decision in *Olivia Road* (n 51 above) which he describes as 'close to the line'. See King (n 2 above) 277.

is a single approach that is universally valid. It is, accordingly, significant that in his chapter (fifteen) O’Cinneide suggests that the search for a uniform method of adjudicating on socio-economic rights may be misguided and that the weak and strong axes of comparison may be inadequate to describe the emerging complexity of socio-economic rights jurisprudence.

O’Cinneide’s argument can be illustrated by his comparison of the South African Constitutional Court’s reasonableness standard with the German Constitutional Court’s concept of a dignified minimum existence. Writing from a European legal perspective, O’Cinneide emphasises the ‘wide-ranging’ nature the reasonableness standard,<sup>80</sup> which I take to refer to the idea that any aspect of a social programme is potentially subject to reasonableness review and that this standard may incorporate a range of considerations. Although reasonableness review has been criticised as overly cautious by South African commentators, its wide-ranging nature is notable and may be related to the transformative imperatives of the South African Constitution or the desire to bring about ‘large-scale social change through nonviolent political processes grounded in law’.<sup>81</sup>

O’Cinneide goes on to argue that the case law of the German Constitutional Court establishing a right to a dignified minimum existence may be more easily accommodated in European legal systems because, presumably, enforcement of such a right would be more focused and less wide-ranging than reasonableness review. O’Cinneide argues that courts would also be performing a role analogous to the enforcement of civil and political rights. Furthermore, courts in European societies typically lack the transformative mandate of the South African Constitutional Court. Enforcement of the right to a dignified minimum existence would not disrupt the overall horizon of resource distribution fixed by the political process, given the extent to which the welfare state in Europe has already largely achieved the right to a dignified minimum existence.

In contrast, in the South African context the right to a dignified minimum existence – effectively a minimum core – has been repeatedly rejected by the Constitutional Court. Cameron comments as follows:

Adopting a minimum core at the beginning of the Court’s socio-economic rights journey could very possibly have precluded government’s incremental acceptance. Given the material plight of so many in South Africa, a specified minimum core – assuming the epistemic difficulties in defining it could be overcome – would have led to findings of widespread violation or failure to comply by government.<sup>82</sup>

Cameron argues further that the Court would not have been able to provide practical remedies for each violation and this would have undermined confidence in the Court and the Constitution. In short, perceptions of forms of socio-economic rights review as weak or strong may not have universal validity and may instead have more to do with factors that apply in particular jurisdictions. O’Cinneide therefore predicts that multiple modes of review may emerge in the field of socio-economic rights, rather than the general model involving concepts such as proportionality and deference that has come to dominate in the field of civil and political rights.

However, even assuming the emergence of multiple modes of socio-economic rights review, it is still likely to be the case that within particular jurisdictions there will be calls

<sup>80</sup> C O’Cinneide (chapter fifteen of this volume) p 316.

<sup>81</sup> Klare (n 19 above) 150.

<sup>82</sup> E Cameron (chapter sixteen of this volume) p 337.

for courts to either weaken or strengthen their chosen standards of review. We have already seen how critics have sought to persuade the South African Constitutional Court to strengthen the reasonableness standard. Likewise, it is possible that the German Constitutional Court may find itself subject to pressure to define the content of the right to a dignified minimum existence with a greater level of specificity, or there will be attempts to expand the reach of the concept so that it embraces a greater range of social welfare claims. O'Conneide's argument therefore complicates without entirely displacing the distinction between weak and strong modes of socio-economic rights review. The reason why this distinction is likely to endure – albeit in different forms in different contexts – is because of epistemic disagreements about the impact of judicial review and because socio-economic rights intersect with deeply held but reasonably contested political beliefs about the appropriate role of the state in providing welfare and reducing inequality.<sup>83</sup>

## VI. CONCLUSION

This chapter provides an introduction to the chapters that comprise the socio-economic rights Part of this book, and the Part as a whole provides an illuminating discussion of socio-economic rights adjudication in comparative perspective. The constraints of this project mean that there are unfortunately omissions. Latin American jurisdictions such as Brazil and Colombia, whose courts are amongst the most activist in enforcing socio-economic rights, are discussed only in passing.<sup>84</sup> However, it is hoped that the socio-economic rights Part of this book nevertheless makes a valuable contribution to a rapidly developing and increasingly important field.

<sup>83</sup> See further Wesson (n 29 above).

<sup>84</sup> For discussion of these jurisdictions, see Flavia Piovesan, 'Brazil: Impact and Challenges of Social Rights in the Courts' in Langford (n 1 above) 182 and Magdalena Sepúlveda, 'Colombia: The Constitutional Court's Role in Addressing Social Injustice' in Langford (n 1 above) 144. For criticism of the Brazilian case-law, see Octavio Ferraz, 'The Right to Health in the Courts of Brazil: Worsening Health Inequities?' (2009) 11 *Health and Human Rights* 33.





# *The Problematic of Social Rights – Uniformity and Diversity in the Development of Social Rights Review*

COLM O'CINNEIDE

## I. INTRODUCTION

**T**HIS CHAPTER PICKS up upon some the themes of uniformity and diversity that recur throughout this book, and examines how they play out in relation to the global debate about 'social rights review', ie when courts are called upon to adjudicate issues relating to the enjoyment of socio-economic rights.<sup>1</sup> It is written as a response to the remarkable surge of interest in social rights review that has taken place over the last few years, and aims to interrogate some of the assumptions being made as to how social rights adjudication may develop in the future.

In what follows, the case is made that the orthodox assumption that courts should not become involved in enforcing social rights is increasingly being called into question. It is out of sync with how constitutional rights law has developed in most jurisdictions, and the distinction it draws between 'enforceable' civil/political rights and 'non-enforceable' social rights is difficult to reconcile with the intertwined and interdependent nature of both sets of rights. This has generated a 'social rights problematic', which increasingly looms large in debates about constitutionalism and the protection of human rights across the globe. New strains of constitutional thought are emerging which reject the previous orthodoxy and instead embrace the idea that legally enforceable social rights guarantees should form part of national constitutional law.

However, these developments are not necessarily leading to the emergence of a single 'general model' of social rights review. Instead, different jurisdictions are responding in very different ways to the pressures being generated by the 'social rights problematic', and a variety of different modes of social rights review are emerging in those states which have decided to depart from constitutional orthodoxy. Common factors may be driving the turn towards social rights adjudication, but diversity may be trumping uniformity in how states are responding to these pressures.

<sup>1</sup> The term 'social rights review' as used in this chapter encompasses court-centred adjudication that either relates directly or indirectly to the individual enjoyment of 'subjective' socio-economic rights, or else involves issues of state compliance with 'objective' constitutional norms such as the *Sozialstaat* principle in German constitutional law or the directive principles set out in Part IV of the Indian Constitution.

Furthermore, a good argument can be made that different solutions may work better in different countries: a mode of social rights review that may be effective in a state such as South Africa might not be so effective in a state such as Germany, and vice versa. The legal protection of social rights may have to be tailored to fit the socio-economic context of a particular society and the normative assumptions that shape its legal system, rather than being imported 'off the peg' from another system.

In making these arguments, some attempt is made to take on board Ran Hirschl's recent criticism that academic commentators discussing social rights review inevitably choose to focus on a few favoured jurisdictions.<sup>2</sup> This chapter draws upon a variety of different jurisdictions in developing its central argument, and in particular upon the European and Anglo-American legal systems with which the author is most familiar: as ever with broad-brush comparative scholarship, readers are invited to consider for themselves whether the arguments presented here resonate with their knowledge and experience of their own particular legal systems.

## II. THE ORTHODOX DISTINCTION BETWEEN 'PERMISSIBLE' CIVIL AND POLITICAL RIGHTS REVIEW AND 'IMPERMISSIBLE' SOCIAL RIGHTS REVIEW

Throughout the democratic world, courts are now expected to play an active role in protecting human rights.<sup>3</sup> However, it is relatively unusual for courts to be given the authority to enforce compliance with social rights, such as those set out in international human rights instruments such as the UN International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Social Charter (ESC) or Article 26 and the San Salvador Protocol to the Inter-American Convention on Human Rights. Such rights are often regarded as vague aspirations whose scope and content are difficult to define.<sup>4</sup> Furthermore, they can give rise to complex and 'polycentric' issues relating to resource allocation, which are usually viewed as best resolved through the give-and-take of the electoral system.<sup>5</sup> As a result, orthodox constitutional theory has tended to assume that any self-respecting democracy must place substantial limits on the power of courts to determine contested issues relating to the enjoyment of social rights, and leave key decisions in this field to be resolved by the political process.<sup>6</sup>

This orthodoxy has not always had the last word when it comes to the framing and interpretation of constitutional texts. Alternative understandings exist as to how social rights should fit within a constitutional order, which are less hostile to the prospect of such rights becoming legally enforceable. These variants on constitutional orthodoxy have generally not put down deep roots in Anglo-American legal systems, but they have found more fertile ground elsewhere.

<sup>2</sup> R Hirschl, 'From Comparative Constitutional Law to Comparative Constitutional Studies' (2013) 11 *International Journal of Constitutional Law* 1, 8–9.

<sup>3</sup> For an analysis of some of the causal factors that lead courts to assume an active role in protecting fundamental rights, see CR Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago IL, University of Chicago Press, 1998).

<sup>4</sup> O O'Neill, 'The Dark Side of Human Rights' 81(2) *International Affairs* (Royal Institute of International Affairs 1944-) (Sub-Saharan Africa, March 2005) 427–39.

<sup>5</sup> As Michael Walzer puts it, social rights 'have their origin in a shared social life, and they partake of the rough and ready character of that life': M Walzer, 'Justice Here and Now' in M Walzer, *Thinking Politically: Essays in Political Theory* (New Haven CT, Yale University Press, 2007) 68–80.

<sup>6</sup> For an overview of these arguments, see A Neier, 'Social and Economic Rights: A Critique' (2006) 13(2) *Human Rights Brief* 1–3.

For example, as Katrougalos has argued, an influential strand of continental European legal thought since the late nineteenth century has tended to view the maintenance of socio-economic well-being as part of the core functions of the state. This line of thinking is now reflected in the *Sozialstaat* or 'social state' principle that now forms part of the normative framework of the German constitutional order amongst others, whereby the state is constitutionally obliged to take positive steps to provide for the social well-being of its inhabitants, and legislation and other legal norms are often interpreted by reference to the requirements of this objective constitutional norm.<sup>7</sup>

Variants of this 'social state' principle can also be found in other constitutional systems.<sup>8</sup> In India, it finds expression in the form of non-legally binding 'directive principles' set out in the constitutional text, which exert considerable influence over the interpretation of the more conventional rights guarantees set out in Part III of the Constitution. Many European constitutional texts now contain express affirmations that they are 'social states',<sup>9</sup> and/or set out a list of protected social rights.<sup>10</sup> So too do many constitutions in the Global South.<sup>11</sup> As Jeff King discusses in his chapter (eighteen) in this book, various US State constitutions also protect an assortment of social rights.

However, until recently, such provisions have tended to be viewed either as non-binding 'maxims of political morality',<sup>12</sup> or as establishing *sui generis* exceptions of limited legal scope. For example, conventional legal doctrine in many of the continental European states whose constitutions contain some reference to social rights and/or to the social state principle usually takes the view that the legislative and executive branches of government are generally best placed to determine how best to give effect to these provisions. As a result, the status of the social rights set out in national constitutions, such as the Articles 21 and 22 of the Constitution of Greece, often remains ambiguous, while the social state principle is often interpreted in a manner that deprives it of much in the way of legal substance.<sup>13</sup>

In general, the orthodox position remains the default mode of modern constitutionalism. The distinction it makes between 'permissible' civil and political rights review and 'impermissible' social rights review is still widely accepted in many parts of the democratic world, while key constitutional actors, including politicians, judges and academic

<sup>7</sup> G Katrougalos, 'The (Dim) Perspectives of the European Social Citizenship', Jean Monnet Working Paper 05/07: [www.jeanmonnetprogram.org/papers/07/070501.pdf](http://www.jeanmonnetprogram.org/papers/07/070501.pdf) (accessed 24 December 2012). See also G Katrougalos and P O'Connell, 'Fundamental Social Rights' in M Tushnet, T Fleiner and C Saunders (eds), *Routledge Handbook Of Constitutional Law* (Oxford, Routledge, 2012), 375–85; C Bommarius, 'Germany's *Sozialstaat* Principle and the Founding Period' (2011) 12 *German Law Journal* 1879–86; in the same volume, HM Heinig, 'The Political and the Basic Law's *Sozialstaat* Principle – Perspectives from Constitutional Law and Theory', 1887–1900.

<sup>8</sup> For a multi-jurisdictional overview, see M Langford (ed), *Socio-Economic Rights Jurisprudence – Emerging Trends in Comparative and International Law* (Cambridge, CUP, 2008).

<sup>9</sup> See eg Article 1(1) of the Constitution of Spain; Article 2 of the Constitution of Portugal; Article 2 of the Constitution of Slovenia; Article 20 of the German Basic Law.

<sup>10</sup> See eg Article 23 of the Constitution of Belgium, Articles 19, 20 and 22 of the Constitution of the Netherlands; Articles 21 and 22 of the Constitution of Greece; Articles 56, 59, 63–72, 108–9, 167, 216 of the Constitution of Portugal. See also C Fabre, 'Social Rights in European Constitutions' in G de Búrca and B De Witte (eds), *Social Rights in Europe* (Oxford, OUP, 2005) 15–28.

<sup>11</sup> Hirschl notes that '[o]f the world's approximately 170 written constitutions, roughly three-quarters make reference to a right to education, and nearly half to a right to health care'. See Hirschl, n 2 above, 8.

<sup>12</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution*, 9th edn (London, Macmillan, 1939) 136.

<sup>13</sup> See C O'Cinneide, 'Austerity and the Faded Dream of a "Social Europe"' in A Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge, CUP, 2014).

commentators, often assume that this distinction is a necessary and inevitable feature of the modern constitutional state.

### III. THE UNSTABLE DISTINCTION BETWEEN CIVIL/POLITICAL AND SOCIAL RIGHTS REVIEW

However, both civil/political and social rights share a common genealogy in Enlightenment political thought,<sup>14</sup> and are linked 'indivisibly' together in the international human rights framework of norms that has developed since 1945.<sup>15</sup> Both are also concerned with protecting and vindicating key human interests such as autonomy, dignity and equality of status.<sup>16</sup> They also share common (Hohfeldian) structural elements and impose similar types of normative obligations upon state and non-state actors.<sup>17</sup> Furthermore, they are interdependent: in general, individuals will be able to enjoy the benefit of their civil and political rights only if their social rights are protected to a certain minimum level, and the same is true in reverse.<sup>18</sup>

As a result, it is difficult to draw clear demarcation lines between civil/political and social rights. Even in states which cling faithfully to constitutional orthodoxy, when courts take steps to protect civil and political rights through the exercise of their constitutional or administrative review powers, it is not uncommon for legal obligations to be imposed upon public authorities that parallel some of the obligations conventionally associated with the social rights set out in instruments such as the ICESCR and ESC. For example, the right to equality and non-discrimination has often been interpreted as entitling individuals to gain access to educational facilities, health care or social welfare from which they had been previously excluded,<sup>19</sup> while the rights to life, privacy and freedom from inhuman or degrading treatment have in certain circumstances been read as imposing obligations upon the state to provide health care, social welfare or housing support to individuals in need.<sup>20</sup>

This means that it will often be possible for certain types of claims having a 'social' character to be litigated throughout a civil and political rights framework, even in states where social rights are regarded as non-justiciable. Much will depend on how widely courts are prepared to interpret the scope of the interests protected by a specific civil and

<sup>14</sup> G Stedman Jones, *An End to Poverty?* (London, Profile Books, 2004).

<sup>15</sup> The Vienna Declaration and Programme of Action of 25 June 1993, endorsed by the UN General Assembly, A/CONF.157/23, 12 July 1993, states at para 5 that all forms of rights, including socio-economic rights, are 'universal, indivisible and interdependent and interrelated'.

<sup>16</sup> For a wide-ranging analysis of the common freedom-reinforcing aims of civil/political and social rights, see S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford, OUP, 2008).

<sup>17</sup> J Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65 *Current Legal Problems* 1–30; A Sen, *The Idea of Justice* (Cambridge MA, Harvard University Press, 2009) 379–86.

<sup>18</sup> Jeremy Waldron has made the point that even the enjoyment of freedom of thought depends on having adequate shelter: see J Waldron, 'Homelessness and the Issue of Freedom' in Waldron, *Liberal Rights: Collected Papers 1981–1991* (Cambridge, CUP, 1993) 309–38.

<sup>19</sup> See eg the US cases of *Brown v Board of Education of Topeka*, 347 US 483 (1954) and *Goldberg v Kelly*, 397 US 254 (1970); the Canadian case of *Eldridge v British Columbia* [1997] 3 SCR 624; and the ECtHR case of *Poirrez v France* (2005) 40 EHRR 34.

<sup>20</sup> See eg the UK cases of *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275 and *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66; see also the Canadian case of *Chaoulli v Quebec (Attorney General)* [2005] 1 SCR 91 and the Indian case of *Olga Tellis v Bombay Municipal Corporation*, AIR 1986 SC 180.

political right, and the extent to which they are willing to accept that such rights are capable of imposing positive obligations upon the state.<sup>21</sup> The situation will also vary according to the readiness of courts and other institutions in a given jurisdiction to accept a 'spill over' of civil and political right protection into the socio-economic realm, involving as it does complex issues of resource allocation and welfare regulation. However, creative lawyers can often find some way of framing 'social' cases as civil and political rights claims, even in legal systems which regard social rights as non-justiciable.<sup>22</sup>

Furthermore, another element of the 'classical' rights-protective role assigned to courts by constitutional orthodoxy, namely the application of administrative law controls to secure compliance by public authorities with the rule of law, may also offer additional 'apertures' through which state policies relating to education, housing, health care, social welfare and other aspects of social rights may be challenged before the courts. For example, a decision by a public authority to withdraw social care payments might be open to attack on the basis that it failed to take into account relevant considerations, or that it was unreasonable or disproportionate when the interests of the affected parties were taken into account, or that the decision was not adopted in accordance with the relevant statutory requirements.<sup>23</sup> Once again, much depends on how willing national courts are to subject resource allocation decisions to close scrutiny. However, case law from France, the United Kingdom and elsewhere provides numerous examples of cases in which individual litigants were able to invoke administrative law to secure their access to social protection.<sup>24</sup>

Courts often attempt to place limits on the incremental expansion of the scope of civil and political rights in order to prevent them acquiring an overtly 'social' dimension.<sup>25</sup> They also regularly grant the legislative and executive branches of the state a wide margin of

<sup>21</sup> For example, the US Supreme Court in cases such as *Webster v Reproductive Health Services*, 492 US 490 (1989) and *DeShaney v Winnebago County Dept of Social Services*, 489 US 189 (1989) has interpreted the rights set out in the US Constitution as only protecting a narrow range of autonomy-based interests, and as imposing limits on state action rather than requiring public authorities to take positive steps to enable individuals to live autonomous lives. As a consequence, US constitutional rights jurisprudence at the federal level has limited socio-economic 'reach'. In contrast, the potential for civil and political rights review to acquire a 'social dimension' is greater when it comes to the ECtHR and national courts that follow the jurisprudential lead of the Strasbourg Court, as they tend to define the scope of protected interests in wider terms and are readier to recognise the existence of positive obligations upon the state: by way of example, contrast the *DeShaney* judgment with the judgment of the Strasbourg Court in *Z v United Kingdom* [2001] 2 FCR 246.

<sup>22</sup> For example, in the UK, Articles 2, 3, 6, 8 and 14 of the ECHR can be invoked in certain circumstances to challenge a refusal by the state to provide individuals with social support in certain circumstances, as seen in cases such as *Limbuela* (n 20 above) and *Manchester City Council v Pinnock* [2010] UKSC 45: see in general C O'Cinneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights' (2008) 5 *European Human Rights Law Review* 583–605. See also the cases from Canada and the US referred to in n 19 above, as well as *Gideon v Wainwright*, 372 US 335 (1963).

<sup>23</sup> See eg in the UK, *R (Rogers) v Swindon NHS Primary Care Trust* [2006] EWCA Civ 392; also *R v North and East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR 622; *R (W) v Birmingham City Council* [2011] EWHC 1147 (Admin); *R (KM) v Cambridgeshire County Council* [2012] UKSC 23.

<sup>24</sup> See in general for the relevant UK case law, E Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Oxford, Hart Publishing, 2007). For an overview of the French jurisprudence, see L Pech, 'Socio-economic Rights in French Law' in M Langford (ed), *Socio-Economic Rights Jurisprudence – Emerging Trends In Comparative And International Law* (Cambridge, CUP, 2008).

<sup>25</sup> See eg the ECHR judgments of *O'Rourke v United Kingdom* (Application no 39022/97), Decision of 26 June 2001 and *Pentiacova v Moldova* (2005) 40 EHRR SE 23. See also the findings of the majority of the Canadian Supreme Court in respect of the scope of application of Section 7 of the Canadian Charter in *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429.

discretion when reviewing decisions which relate to the allocation of resources.<sup>26</sup> Variants of such 'containment doctrines' exist in many legal systems, all designed to limit the 'spill over' of civil and political rights protection and administrative law controls into the socio-economic realm. However, these containment doctrines are rarely formulated with precision: they usually resemble 'rules of thumb' rather than hard and fast legal rules. This tends to give rise to uncertain boundaries, blurred distinctions and inconsistent case outcomes.<sup>27</sup> In addition, attempts to confine the gradual evolution of human rights law within the confines of orthodoxy often generate unconvincing judgments and unstable doctrinal positions.<sup>28</sup>

The boundary between civil/political and social rights review thus tends to be unstable, permeable and blurred. It will often be possible to litigate claims relating to the enjoyment of social rights through various 'apertures' in constitutional and administrative law, even in states which in accordance with constitutional orthodoxy treat such rights as non-justiciable expressions of good intentions. Furthermore, the dividing line between 'legitimate' civil and political rights review and 'illegitimate' social rights review is often prone to shifting ground: limits imposed on the socio-economic reach of a particular civil/political right by the application of a 'containment doctrine' in one case are often circumvented or distinguished in another case involving a similar set of facts, often leading to the creation of a complex, fluid and uncertain legal position.

This poses a serious challenge to the orthodox position: if the two sets of rights cannot be clearly distinguished, and courts are already engaged in adjudicating issues that are closely linked to the enjoyment of social rights, then the case for maintaining a sharp distinction between civil/political and social rights review begins to look shaky. In particular, the 'containment doctrines' that attempt to minimise judicial intervention into the socio-economic sphere are open to criticism: they often seem to distort the logical development of human rights and administrative law, just to preserve a distinction between the civil/political and social realms that appears increasingly to be an artificial construct.

In general, the strict distinction posited by constitutional orthodoxy between civil/political and social rights review does not appear to reflect the reality of how constitutional jurisprudence has developed since *Brown v Topeka Board of Education* – itself a case which graphically highlights how judicial enforcement of equality rights often requires courts to engage with issues relating to the fairness of socio-economic provision by public authorities.

<sup>26</sup> See eg *Hatton v United Kingdom* (2003) 37 EHRR 611 [GC]; *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ 1406; *Dandridge v Williams*, 397 US 471 (1970) and *San Antonio Independent School District v Rodriguez*, 411 US 1 (1973); *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429 (in particular the findings of the majority of the Canadian Supreme Court in relation to Section 15 of the Charter).

<sup>27</sup> For a detailed discussion of the problematic nature of how such 'containment doctrines' play out in the context of the case law relating to poverty of the UK courts and the European Court of Human Rights, see C O'Cinneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights' (2008) 5 *European Human Rights Law Review* 583–605.

<sup>28</sup> For example, contrast the approaches adopted by the English Court of Appeal in the cases of *R v Cambridge Health Authority, ex parte B* [1995] 1 WLR 898 and *R (on the application of Rogers) v Swindon NHS Primary Care Trust* [2006] EWCA Civ 392, and the general critique of UK case law in this area set out in E Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Oxford, Hart Publishing, 2007); see also the criticism of the *Gosselin* judgment of the Canadian Supreme Court in N Kim and T Piper, 'Gosselin v Quebec: Back to the Poorhouse' (2003) *McGill Law Journal* 749–81.



#### IV. THE QUESTIONABLE LEGITIMACY OF THE ORTHODOX POSITION

The intertwined nature of the two sets of rights also calls into question whether the orthodox position can be justified from a normative point of view. In particular, the manner in which constitutional orthodoxy denies legal protection to social rights appears increasingly open to question. Given that both sets of rights protect key human interests, the argument can be made that courts should play a role in protecting both the civil/political and the social rights of individuals, rather than leaving the latter to be determined by majoritarian political processes, economic pressures and bureaucratic *fiat*, as orthodox doctrine requires.<sup>29</sup>

As Jeff King has argued, support for this contention can be derived from a range of political theories ranging from Rawlsian liberalism to Habermasian discourse ethics, which support the conclusion that a just society should protect the human right to a 'social minimum'.<sup>30</sup> Writing from within the liberal egalitarian tradition, Frank Michelman in particular has argued that any 'legitimation-worthy' national constitutional order must be committed to ensuring as far as possible that everyone is capable of participating in the political, social, economic and cultural life of their community, and that legally enforceable social rights guarantees giving effect to this 'social principle' should by extension form part of constitutional law.<sup>31</sup>

The case for enhanced judicial enforcement of social rights also derives support from the trajectory of development of human rights law, theory and practice over the last few decades. In the Anglo-American legal world at least, rights have historically been understood as establishing an obligation upon the state not to interfere with individual freedom.<sup>32</sup> However, Kai Moller has noted the existence of an 'emerging trend towards an autonomy-based understanding of constitutional rights', whereby rights in general are increasingly interpreted as 'being about enabling people to live autonomous lives, rather than disabling the state in certain ways'.<sup>33</sup> The internal logic underlying this evolution in 'rights talk' points towards the need to confer some degree of legal protection upon socio-economic rights: if rights are primarily concerned with protecting the ability of individuals to enjoy a dignified and/or autonomous existence, then it arguably makes sense to also protect individuals against a denial of access to the basic socio-economic necessities that make such an existence possible in the first place. As Moller pithily puts it, the legal protection of socio-economic rights is 'required by a coherent understanding of autonomy: socio-economic rights protect the preconditions of an autonomous life'.<sup>34</sup>

<sup>29</sup> For more detailed elaboration of this argument, see C Fabre, *Social Rights Under the Constitution: Government and the Decent Life* (Oxford, OUP, 2000); S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford, OUP, 2008); P O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Oxford, Routledge, 2012); J King, *Judging Social Rights* (Cambridge, CUP, 2012).

<sup>30</sup> J King, *Judging Social Rights* (Cambridge, CUP, 2012) 17–57, 322–23.

<sup>31</sup> F Michelman, 'Socioeconomic Rights in Constitutional Law: Explaining America Away' (2008) 6 *International Journal of Constitutional Law* 663, 675.

<sup>32</sup> Katrougalos has argued that continental European legal systems have tended to adopt a less libertarian view of rights: see Katrougalos, n 7 above.

<sup>33</sup> K Moller, 'Two Conceptions of Positive Liberty: Towards an Autonomy-Based Theory of Constitutional Rights' (2009) 29 *Oxford Journal of Legal Studies* 757.

<sup>34</sup> *ibid*, 758. See also the comments of the President of Israel's Supreme Court, Dorit Beinisch, in her judgment in the case of HCJ 10662/04 *Salah Hassan v The National Insurance Institute*, 28 February 2012: 'in accordance with the prevailing approach today, there is no basis for applying a sharp and clear distinction

The development of international human rights law is clearly reflecting the logic of this 'autonomy-based' understanding of rights: social rights are receiving increasing levels of legal protection, while distinctions between civil/political and social rights are being eroded. As previously noted, the 'indivisibility' of civil/political and social rights has been repeatedly affirmed by various international treaties and declarations (albeit at a high level of abstraction).<sup>35</sup> More concretely, the jurisprudence of the Inter-American Court of Human Rights, the European Court of Human Rights and the African Commission on Human and Peoples Rights has begun to provide more protection against state (in)action which denies individuals access to education, health care, welfare and other forms of social provision.<sup>36</sup> New mechanisms such as the Collective Complaints Protocol to the ESC and the Optional Protocol to the ICESCR have also been established, which allow individuals and groups to bring complaints alleging that states have failed to comply with their social rights commitments to the relevant treaty bodies, the UN Committee on Economic, Social and Cultural Rights (CESCR)<sup>37</sup> and the European Committee on Social Rights (ECSR).<sup>38</sup> Furthermore, the most recent international human rights treaty to be concluded within the framework of the United Nations, the Convention on the Rights of Persons with Disabilities, seamlessly integrates civil and political and socio-economic obligations in its text.<sup>39</sup>

All of these developments at international level lend support to the argument that the inner logic of human rights law leads on towards greater protection of social rights and a blurring of the distinction between civil/political and social rights. They also call into question the maintenance of a strict separation between both categories of rights at national level: the orthodox position appears increasingly out of step with international human rights law, and therefore becomes vulnerable to the charge that it is not keeping pace with the evolution of international standards.<sup>40</sup>

between social rights and political rights in terms of the positive or negative obligations incumbent on the state, or in terms of the question of the allocation of resources. The ostensible gaps between the rights are primarily the product of historical evolution, rather than of substantive differences between the rights themselves. Indeed, "thou shall" and "thou shall not" jointly form an integral part of the protection of all human rights, whatever their character'.

<sup>35</sup> See the 1993 Vienna Declaration and Programme of Action (n 15 above). Note too that the Universal Declaration of Human Rights of 1948 lists both civil/political and social rights.

<sup>36</sup> See eg *Airey v Ireland* (1979) 2 EHRR 305; *Connors v United Kingdom* (2004) 40 EHRR 189; *Öneryildiz v Turkey* (2004) 39 EHRR 253 (ECtHR); *Five Pensioners' Case v Peru*, Judgment of 28 February 2003, Inter-Am Ct HR (Series C) No 98; *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, Communication 155/96 (2001) African Human Rights Law Reports 60 (ACHPR, 2001). See also IE Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands Under the European Convention on Human Rights* (Dordrecht, Martinus Nijhoff, 2009); T Mellish, 'The Inter-American Court of Human Rights: Beyond Progressivity' in M Langford (ed), *Socio-Economic Rights Jurisprudence – Emerging Trends in Comparative and International Law* (Cambridge, CUP, 2008); L Chenwi, 'An Appraisal of International Law Mechanisms for Litigating Socio-Economic Rights, with a Particular Focus on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and the African Commission and Court' in S Liebenberg and G Quinot (eds), *Law and Poverty: Perspectives from South Africa and Beyond* (Capetown, Juta, 2012) 241–63.

<sup>37</sup> See the Optional Protocol to the ICESCR, adopted in 2008 by UN General Assembly Resolution A/RES/63/117, which came into force having received 10 ratifications on 5 May 2013.

<sup>38</sup> See the 1996 Additional Protocol to the ESC (the 'Collective Complaints Protocol'), CETS n° 158, opened for signature in Strasbourg on 9 November 1995; H Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee on Social Rights' (2009) 9 *Human Rights Law Review* 61.

<sup>39</sup> MA Stein, 'Disability Human Rights' (2007) 95 *California Law Review* 75.

<sup>40</sup> Chenwi (n 36 above).

Other factors are also calling the orthodox position into question. For example, the assumption that the legal process lacks the capacity to deal with complex issues of resource allocation that involve the interests of multiple actors is being increasingly questioned. The ‘technology’ of judicial review has evolved in recent decades, in particular with the development of new forms of remedial order, the greater involvement of third-party interveners in court hearings, and the emergence of ‘catalytic’ or ‘dialogical’ modes of review whereby courts act as ‘prods’ and enter into a dialogical relationship with other constitutional actors to address violations of constitutional rights.<sup>41</sup> A number of commentators have made the case that these new adjudicatory mechanisms make it possible for courts to protect social rights through a genuinely participative process open to all affected parties, while avoiding trespassing too far into the political domain.<sup>42</sup> Others have made the related point that courts successfully engage with complex and polycentric issues of resource allocation in other contexts, and have questioned the orthodox assumption that social rights adjudication would pose particular problems in this respect.<sup>43</sup>

Deeper politico-legal currents are also at work, which appear to be generating greater support for the idea that social rights should be constitutionally embedded and given greater legal protection through the courts. Global competitive pressures, the influence of neo-liberal market ideologies and a series of national debt crises have led states across the world to reduce the level of public investment in the provision of providing education, welfare and health services. This has encouraged critics of this trend to seek new ways of embedding social rights in national constitutional frameworks, as a means of protecting these rights against further erosion by market forces.<sup>44</sup> Furthermore, these developments have reduced faith in the ability of political processes to defend social rights, and encouraged new interest in the existing ‘social state’ provisions of national constitutions and the elements of international human rights law that relate to socio-economic rights.

These shifts in the background context have linked together with the more specifically ‘legal’ factors discussed above to erode faith in the orthodox position that courts should not engage in social rights review. Even as the instability of the distinction between civil/political and social rights review becomes more apparent, the normative basis for this distinction is thus being called into serious question.

## V. THE ‘SOCIAL RIGHTS PROBLEMATIC’

The criticisms directed at the orthodox position do not attract universal support. Indeed, in many jurisdictions, they constitute a distinctly heterodox strand of opinion. Opponents of the existing orthodoxy face the burden of having to outline how judicial protection of social rights might work in practice if they are to convince others of the

<sup>41</sup> K Young, ‘A Typology of Economic and Social Rights Adjudication: Exploring the catalytic function of judicial review’ (2010) 8 *International Journal of Constitutional Law* 385.

<sup>42</sup> S Liebenberg ‘Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of “Meaningful Engagement”’ (2012) 2 *African Human Rights Law Journal* 1–29; M Wesson, ‘Disagreement and the Constitutionalisation of Social Rights’ (2012) 12 *Human Rights Law Review* 221; A Pillay, ‘Toward Effective Social and Economic Rights Adjudication: The role of meaningful engagement’ (2012) 10 *International Journal of Constitutional Law* 742.

<sup>43</sup> J King, ‘The Pervasiveness of Polycentricity’ (2008) *Public Law* 101.

<sup>44</sup> K Schepple, ‘A Realpolitik Defense of Social Rights’ (2004) 82 *University of Texas Law Review* 1921.

need for change, a project that brings with it its own challenges. In addition, supporters of the existing orthodoxy can put forward an array of credible arguments as to why the distinction between civil/political and social rights should be maintained: in particular, they can point to the uncertain content of social rights, the potential for social rights review to destabilise existing systems of social provision and to benefit certain classes of litigants more than others, and the risk that letting judges adjudicate disputes relating to education, welfare and health care would grant judges excessive authority and limit the scope of democratic decision-making.<sup>45</sup>

However, a substantial question mark nevertheless now hangs over the legitimacy of the orthodox position, and many academic commentators, NGOs, international human rights bodies, politicians and even judges are calling for new legal substance to be given to social rights in national law. Furthermore, this debate is happening in multiple constitutional systems across the democratic world, albeit to varying degrees of intensity.<sup>46</sup> Constitutional orthodoxy in this context is no longer assumed to be self-evidently correct: instead, it is now under serious attack.

In general, it is now possible to speak of a 'social rights problematic', whereby the absence of legal protection of such rights is increasingly viewed as constituting a defect or lacuna within any given constitutional order.<sup>47</sup> By calling conventional constitutional orthodoxy into question, the 'problematic of social rights' destabilises the status quo and opens up space for new approaches to be tried and tested. It also encourages key constitutional actors to think again about much of the received wisdom that has kept social rights review fairly circumscribed in many jurisdictions.

This problematic seems to be driving the recent extraordinary explosion of academic interest in social rights, and also the heightened level of NGO engagement with the issue of the legal enforceability of such rights. It is reflected in the remarkable shift throughout many of the democracies of the Global South away from the orthodox model and towards an embrace of legally enforceable social rights. It also seems to be adding fuel to the expansion of protection for social rights at the international level, and the debate that is taking place across the European Union about how best to protect the particular characteristics of the European model of 'social citizenship'.

The existence of this problematic can be seen even in states which continue to adhere firmly to the orthodox position. For example, in the United Kingdom, there has been discussion of whether social rights should enjoy greater legal protection in the context of various debates that have taken place over the last few years about the possibility of adopting a new Bill of Rights: even though political interest in this issue remains limited for now, the Northern Irish Human Rights Commission in preparing its advice on a potential Bill of Rights for Northern Ireland, the Commission on a Bill of Rights which reported in 2012 on the reform of existing UK human rights law, and the Joint Committee

<sup>45</sup> For a useful overview of both sides of this debate, see C Gearty and V Mantouvalou, *Debating Social Rights* (Oxford, Hart Publishing, 2010).

<sup>46</sup> The volume of recent academic commentary on this subject from jurisdictions across the world, plus the explosive growth of NGO engagement with social rights, is apparent from a brief perusal of the relevant literature: for a taste of the global reach of this phenomenon, see M Langford (ed), *Socio-Economic Rights Jurisprudence – Emerging Trends in Comparative and International Law* (Cambridge, CUP, 2008); A Yamin and S Gloppen (eds), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Cambridge MA, Harvard University Press, 2011); V Garun and D Brinks (eds), *Courting Social Rights: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge, CUP, 2008).

<sup>47</sup> See F Michelman, 'Socioeconomic Rights in Constitutional Law: Explaining America Away' (2008) 6 *International Journal of Constitutional Law* 663, 663.

on Human Rights of the UK Parliament in its 2008 report on a Bill of Rights for the United Kingdom all felt obliged to consult upon and discuss the pros and cons of making social rights enforceable.<sup>48</sup>

Another example of the manner in which this ‘social rights problematic’ is influencing legal debate can be taken from the context of European Union law. The EU Charter of Fundamental Rights was drawn up in 2000 to fill the gap left by the absence of a clear set of human rights standards within the framework of European law, and in 2009 acquired a legal status equal to the core EU treaties as part of the reforms introduced by the Treaty of Lisbon. Significantly, the Charter includes a list of guaranteed social rights and principles: their legal status is uncertain, but it is clear that these rights and principles must be taken into account by the Court of Justice of the European Union (CJEU) when interpreting and applying EU law.<sup>49</sup> In a series of recent controversial judgments, the CJEU has been accused of giving priority to the free movement provisions of EU law over the social rights provisions of the Charter.<sup>50</sup> These judgments crystallised the concerns of many commentators that EU law lacked an adequately developed ‘social dimension’, and have generated calls from a variety of sources across the European Union for the Court to place greater weight on the Charter’s social rights provisions.<sup>51</sup> The impact of the problematic can also be detected in judgments of the European Court of Human Rights: individual judges of the Court have signalled support for a further extension of the scope of Convention rights to cover certain basic social rights, even though the Court itself has adopted a cautious approach in this respect.<sup>52</sup>

The extent to which this problematic is having a tangible impact on political and legal debate varies from state to state. There are many prominent jurisdictions where the growth of academic and NGO interest in social rights has attracted little response from mainstream legal opinion, such as the United States (at least at federal level). Courts are often reluctant to depart from the established orthodoxy, and the political organs of the state are often indifferent or actively hostile to the prospect of an enhanced judicial role in protecting social rights. Indeed, in certain legal systems, the power of courts to engage in social rights review has been cut back. For example, in Hungary, recent constitutional amendments have limited the authority of the Hungarian Constitutional Court to decide matters relating to the socio-economic sphere: these amendments were introduced in response to the development by the Court from the 1990s onward of a substantial social rights jurisprudence based upon the concept of human dignity, which demonstrates the possibility that the pressure generated by the social rights problematic may trigger a backlash.<sup>53</sup>

<sup>48</sup> Joint Committee on Human Rights, Session 2007–08, 29th Report, *A Bill of Rights for the UK?*, HL 165-I/HC 150-I, 10 August 2008, 43–56; Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us* (Ministry of Justice, 2012) 147–48.

<sup>49</sup> D Ashiagbor, ‘Economic and Social Rights in the European Charter of Fundamental Rights’ (2004) 9 *European Human Rights Law Review* 63.

<sup>50</sup> See in particular Case C-438/05, *International Transport Workers Federation, Finnish Seamen’s Union v Viking Line*, [2007] ECR I-10779 (CJEU); Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, [2007] ECR I-11767 (CJEU).

<sup>51</sup> See eg C Joerges and F Rödl, ‘On De-formalisation in European Politics and Formalism in European Jurisprudence in Response to the “Social Deficit” of the European Integration Project: Reflections after the Judgments of the ECJ in *Viking* and *Laval*’ (2009) 15 *European Law Review* 1–19.

<sup>52</sup> See eg the partly concurring, partially dissenting opinion of Judge Pinto De Albuquerque in *Markin v Russia* (Application no 30078/06), Judgment of 22 March 2012 [GC] (CJEU).

<sup>53</sup> See eg Article 17 of the Fourth Amendment (CDL-REF(2013)014) to the Fundamental Law of Hungary (CDL-REF(2013)016 – consolidated version), analysed by the European Commission for Democracy Through Law (the ‘Venice Commission’) in its Opinion 720/2013, adopted on 17 June 2013, paras 109–14.

However, it is clear that key constitutional actors in many states (including legislators, judges and academic commentators) are becoming more accepting of the possibility that judicial protection of social rights may be a worthwhile addition to the repertoire of modern constitutionalism. In state after state, the fluid and porous boundary line between 'permitted' civil and political/administrative review and 'impermissible' social rights review is shifting, in a manner that reflects the slow crumbling of the old constitutional orthodoxy.

In particular, constitutional courts in a variety of states are beginning to interpret concepts such as human dignity and rights such as freedom from inhuman and degrading treatment as having a 'social dimension', ie as establishing a right not to be subject to degrading living conditions as a result of state action or inaction. For example, the German Constitutional Court in its *Hartz IV* judgment in 2010 confirmed that the principle of human dignity set out in Article 1 of the Basic Law required that persons in need be provided with sufficient material support to enable them to maintain a dignified existence and to participate in the social, cultural and political life of their society, and that the legislature had failed to set the level of social security benefits in a manner that took adequate account of this requirement.<sup>54</sup> Subsequently, in its *Asylum Seekers Benefits Law* (*Asylbewerberleistungsgesetz*) judgment, the Constitutional Court similarly ruled that the amount of cash benefit paid to asylum seekers awaiting processing of their claims was similarly not compatible with the requirement of the principle of human dignity.<sup>55</sup> Both judgments affirm that the state is obliged to take positive steps to vindicate the social dimension of the human dignity principle, just as it is obliged to respect its more 'classical' civil and political dimensions.<sup>56</sup> Constitutional courts in a variety of other European states have followed a similar logic, as has the Indian Supreme Court and a range of international tribunals including the ECtHR and the Inter-American Court of Human Rights.<sup>57</sup>

Furthermore, new strains of constitutionalism are emerging which reject the orthodox belief that civil/political and social rights review can be clearly distinguished, and instead take the view that the protection of social rights should form part of the core functions of a democratic constitutional order. As previously noted, this is particularly the case in the Global South, where the protection of social rights is increasingly viewed as an integral element of the project of 'transformative constitutionalism' that is shaping the development of new constitutional frameworks across Latin America, Africa

<sup>54</sup> BVerfG, 1 BvL 1/09, 9 February 2010, Absatz-Nr (1-220) (Germany).

<sup>55</sup> BVerfG, 1 BvL 10/10, 18 July 2012, Absatz-Nr (1-140) (Germany).

<sup>56</sup> See C Bittner, 'Human Dignity as a Matter of Legislative Consistency in an Ideal World: The Fundamental Right to Guarantee a Subsistence Minimum in the German Federal Constitutional Court's Judgment of 9 February 2010' (2011) 12 *German Law Journal* 1941; in the same volume, S Egidy, 'The Fundamental Right to the Guarantee of a Subsistence Minimum in the *Hartz IV* Case of the German Federal Constitutional Court', at 1961. See also the following Constitutional Court (BVerfG) and Federal Administrative Court (BVerwG) decisions: BVerfGE 1, 97 (104f); BVerwGE 1, 159 (161); BVerwGE 25, 23 (27); BVerfGE 40, 121 (133, 134); BVerfGE 45, 187 (229); BVerfGE 82, 60 (85) and BVerfGE 99, 246 (259) (Germany).

<sup>57</sup> See the analysis of the jurisprudence of the Eastern European courts in W Sadurski, 'Constitutional Courts in the Process of Articulating Constitutional Rights in the post-Communist States of Central and Eastern Europe Part 1: Social and Economic Rights' (2012) EUI Working Paper Law No 2002/14; see also eg *Olga Tellis v Bombay Municipal Corporation*, AIR 1986 SC 180 (India); *R (Adam and Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66 (United Kingdom); *MSS v Greece and Belgium* (Application no 30696/09), Decision of 21 January 2011 [GC] (ECtHR).



and South Asia.<sup>58</sup> In this respect, it is striking that recent constitutional revision processes in states as diverse as Brazil, Ecuador, Kenya and Mexico have extended the scope of legal protection for social rights – it appears that courts across the developing world are increasingly expected to play some role in enforcing respect for social rights as a counter-weight to neo-liberal economic pressures and the lingering after-effects of colonialism.

However, it would be a mistake to view this tendency as confined to the ‘new’ democracies of Africa, Latin America and South Asia. Courts across a range of Southern and Eastern European states have in recent years shown a willingness to strike down government measures which are deemed to be incompatible with the ‘social state principle’, which has therefore acquired a new prominence in the European constitutional landscape.<sup>59</sup> The social rights provisions of the EU Charter of Fundamental Rights look set to reinforce this trend. Indeed, it is possible that a new ‘European legal concept of social rights’ is emerging, at least in civil law jurisdictions with a strong tradition of interventionist constitutional courts, whereby courts are increasingly expected to play a role in ensuring that the minimum requirements of the ‘social state’ principle are respected.<sup>60</sup>

In summary, the ‘social rights problematic’ appears to be destabilising the existing orthodoxy in many parts of the world. Many legal systems are responding to the normative tension it generates by choosing to expand the range of circumstances in which courts can enforce compliance with social rights. In other jurisdictions, it is having less impact, at least for now, and many legal systems remain highly attached to the orthodox position.<sup>61</sup> However, in general, the problematic has become a feature of modern constitutionalism: the issue of whether social rights should be justiciable now looms large in debates about constitutional law and human rights in a way that would have been unthinkable 20 years ago.

## VI. THE DIVERSE FORMS OF SOCIAL RIGHTS REVIEW

These developments have triggered considerable debate about the merits of social rights review, and how courts should best go about giving effect to such rights. Much of this discussion has assumed that the legal protection of social rights will involve courts exercising wide-ranging review powers over government policy in areas such as education, health care, social welfare and so on, with the judges making use of South African-style

<sup>58</sup> K Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146; M Garcia-Villegas, ‘Law as Hope: Constitution and Social Change in Latin America’ (2002) 20 *Wisconsin International Law Journal* 353.

<sup>59</sup> See eg Judgments no 353/2012 and no 187/2013 of the Portuguese Constitutional Court, and Case no 2009-43-01 decided by the Latvian Supreme Court in 2009, which involved judicial determinations that austerity measures were incompatible with constitutional guarantees of social rights.

<sup>60</sup> Katrougalos (n 7 above) 14.

<sup>61</sup> Paul O’Connell has argued that national apex courts are in general articulating a concept of fundamental rights that is ‘congruent’ with a narrow, neo-liberal concept of such rights and therefore are ideologically predisposed to limit protection for socio-economic rights: see P O’Connell, ‘The Death of Socio-Economic Rights’ (2011) 74 *Modern Law Review* 532. While his argument has some force, it struggles to account for the willingness of constitutional courts in many continental European and Latin American jurisdictions in cases such as *Hartz IV* to stretch the existing envelope of rights protection to protect social rights: it also seriously overstates the freedom of apex courts to shape constitutional norms in this context.



'reasonableness' analysis or a similar method of adjudication to assess whether sufficient respect has been shown to these rights.<sup>62</sup>

However, the pressure being exerted by the social rights problematic on legal systems is not necessarily leading to the emergence of this type of single, generic 'general model' of social rights review. Instead, different jurisdictions are responding in very different ways to these pressures. As previously mentioned, some are clinging to the orthodox position: others are expanding legal protection for social rights, but doing so in diverse ways.

This reflects the fact that legal systems differ in the extent to which social rights review can be effectively integrated into their constitutional frameworks without coming into serious conflict with other fundamental norms: in particular, considerable variations exist between states as to the extent to which judicial intervention in the socio-economic sphere will be deemed to be legitimate. Furthermore, differences also exist between the constitutional 'starting points' from which social rights review develops, the manner in which claims relating to such rights are litigated, and the background socio-economic context against which they play out. These 'boundary conditions' limit the extent to which social rights can be legally enforced in any given jurisdiction, and also will structure how these rights are adjudicated, interpreted and enforced. Furthermore, as different values tend to be assigned to these boundary conditions in different states, they also ensure that considerable variations will exist between how legal systems respond to the social rights problematic.

To start with, the textual and doctrinal starting points from which progressive expansion of protection for social rights develops in any given legal system will inevitably continue to mould the form that such protection takes in the future. For example, the *Hartz IV* and the *Asylum Seekers Benefits Law* judgments of the German Constitutional Court are rooted in the provisions of Article 1 of the Basic Law that guarantee human dignity. Therefore, any subsequent jurisprudence will have to be rooted in this principle of human dignity: this will inevitably limit the extent to which the German courts will be prepared to engage in wide-ranging social rights review, as not every potential infringement of a social right necessarily affects human dignity. However, it also means that individuals are guaranteed access to the minimum core of social provision that will ensure a dignified existence – the *Existenzminimum*, in German constitutional terminology – and this right will receive strong protection from the courts. In contrast, the socio-economic rights jurisprudence of the South African courts has emerged from the provisions of Sections 26 and 27 of the South African Constitution of 1996, which require the state to take 'reasonable legislative and other measures . . . to achieve the progressive realisation' of a number of social rights. As a consequence, the South African Constitutional Court has adhered closely to its well-known 'reasonableness review' standard and steered clear of a 'minimum core' approach.<sup>63</sup> In both countries, the starting point from which social rights review has developed has structured the case law that has followed, leading to different adjudicatory approaches: furthermore, it is unlikely that developments in the future in either legal system will divert much from the original templates that have been laid down.

<sup>62</sup> See eg the debate in the UK on the potential inclusion of socio-economic rights in any new 'British Bill of Rights' (n 48 above).

<sup>63</sup> See in particular *Government of the Republic of South Africa v Grootboom* (2001) (1) SA 46, 66 (CC) (South Africa); *Mazibuko and others v City of Johannesburg and others* (2010) (4) SA 1 (CC) (South Africa).

Much also depends on the source of judicial authority to engage in social rights review, the nature of the constitutional culture in which they operate, and the de facto limits on their power. If the courts in any given jurisdiction are expected to give effect to the aspirations of 'transformative constitutionalism' by discharging their functions in a way that maximises respect for the full spectrum of human rights, then they will often enjoy a clear mandate to play a wide-ranging 'catalytic', 'systemic' or 'expressive' role in reviewing how public authorities give effect to social rights.<sup>64</sup> However, if they are expected to play a more minimalist role, then issues of legitimacy, capacity and competence will inevitably loom larger in any debates about social rights review, and courts may end up playing a much more limited role in protecting such rights.

Courts that have a clear constitutional mandate to engage in social rights review and that also enjoy considerable social and political legitimacy in the exercise of their review powers will therefore be usually much more willing to venture into the terrain of social rights review than courts which lack such legitimacy.<sup>65</sup> Furthermore, the *relative* legitimacy of courts vis-à-vis other branches of government will be important: if democratic accountability mechanisms and expert-bureaucratic decision-making in a given state are responsive, transparent and open to popular participation, then the case for courts to engage in wide-ranging social rights review may be more contestable than in less well-functioning democracies.<sup>66</sup>

The socio-economic structure of a particular society, and especially the extent to which it has a developed economy and/or welfare state, will also be relevant. 'Full-blown' social rights review may pose a greater risk of destabilisation to European-style complex welfare systems than to more rudimentary social provision systems in states such as India, and courts will inevitably take these considerations into account when scrutinising decisions made by public authorities which relate to the socio-economic realm.<sup>67</sup>

The nature of 'social' claims that are brought before courts will also be significant, not least because these factors are likely to influence how case law develops. Courts are likely to react with hostility, or at least to tread with caution, when confronted with claims which attempt to disrupt complex schemes for allocating resources to different

<sup>64</sup> For the concept of 'catalytic' review, see K Young, 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review' (2010) 8 *International Journal of Constitutional Law* 385. For the notion of social rights review performing an 'expressive' function, see C Sunstein, 'Social and Economic Rights? Lessons from South Africa' in *Designing Democracy: What Constitutions Do* (Oxford, OUP, 2001), 231; M Khosla, 'Making Social Rights Conditional: Lessons from India' (2010) 8 *International Journal of Constitutional Law* 739, 761–63; G Brinks and D Brinks, 'Human Rights as Demands for Communicative Action' (2012) *Journal of Political Philosophy* 1.

<sup>65</sup> In Europe, it is noticeable that it has been powerful constitutional courts such as the German, Polish and Portuguese Constitutional Courts which are charged with interpreting constitutional texts whose provisions contain express references to the 'social state' principle which have taken the lead in developing social rights review. The same was true of the Hungarian Constitutional Court, when it was active in protecting social entitlements against austerity measures in the 1990s: see Schepple, 'A Realpolitik Defense of Social Rights' (n 44 above).

<sup>66</sup> Khosla has emphasised how what he describes as 'conditional' social rights review in India has developed in response to the perceived under-performance of democratic institutions and the state bureaucracy in combating poverty: see M Khosla, 'Making Social Rights Conditional: Lessons from India' (2010) 8 *International Journal of Constitutional Law* 739. See also D Landau, 'The Reality of Social Rights Enforcement' (2012) 53 *Harvard Journal of International Law* 189.

<sup>67</sup> Jeff King has argued that social rights review needs to make room for an extensive and well-developed concept of deference, in part to minimise the possibility of unwanted consequences: see J King, *Judging Social Rights* (Oxford, OUP, 2012).

groups in need, or which raise issues of large-scale resource allocation, or which differ radically from established situations where social provision is provided to groups in need.<sup>68</sup> In contrast, they are more likely to react favourably to claims whose resource implications are relatively predictable and/or limited, or which pose a lower chance of causing disruption to the socio-economic ordering of society – and this appears to be generally true in relation to courts exercising ‘full-blown’ social rights review as it is for courts having a much more limited role in this context.<sup>69</sup> However, just as that which counts as a ‘disruptive’ claim varies from state to state, the trajectory of case law development may also differ depending upon the jurisdictions being compared.

Much will often also depend on the degree of consensus that exists in a society as to how resources should be distributed, which in turn links back to the dominant ideological currents that shape legal and political debate in that jurisdiction. Octavio Ferraz and Goodwin Liu have both made the argument that social rights review must be structured around the question of whether resources have been allocated in a manner that is ‘fair’, the general contours of which must be determined in general terms by the democratically accountable branches of the state and not the judiciary.<sup>70</sup> Leaving aside the issue of whether their normative arguments are correct, it is noteworthy that courts often appear more willing to protect entitlements related to the enjoyment of social rights which accord with the overall resource allocation priority choices fixed by governments than they are to disrupt these priorities.<sup>71</sup> Furthermore, as Liu argues, court decisions that disrupt these priorities will be more open to attack and the possibility of being overturned or circumvented. Also, other constitutional actors are more likely to make provision for social rights to be legally enforceable when a social consensus appears to exist as to how they should be interpreted and applied.

The interplay of all of these factors serves to shape the nature and extent of social rights review in any given legal system: they even influence the development of jurisprudence in legal systems committed to ‘full-blown’ social rights review. The way these ‘boundary conditions’ play out will also vary from state to state, which ensures that different modes of review will evolve in line with these variations.

As a result, while the blurred boundary between orthodox civil and political/administrative law review and heterodox social rights review and the ‘social rights problematic’

<sup>68</sup> See eg the contrast between the hostile attitude of the English Court of Appeal to the wide-ranging claims of the applicants in *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ 1406, which if successful would have entailed the disruption of well-established schemes relating to the allocation and maintenance of public housing, with the much more accommodating approach of the UK House of Lords to claims for emergency relief from a well-defined group of asylum-seekers with relatively predictable needs which had until recently been covered by the public purse in *R (Adam and Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66.

<sup>69</sup> It could be argued that the South African case law illustrates this point well – the Constitutional Court has been readier to grant relief in housing cases such as *Occupiers of 51 Olivia Road v City of Johannesburg* (2008) 5 BCLR 475 (CC) and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (2009) 9 BCLR 847 (CC), where the resource implications of its judgments were easy to quantify, than in other contexts. Notably, the only case in which the Court granted relief which had relatively large-scale cost implications was *Khosa and others v Minister of Social Development and others* (2004) (6) SA 505 (CC), where the Court ultimately based its conclusions on a non-discrimination analysis.

<sup>70</sup> G Liu, ‘Rethinking Constitutional Welfare Rights’ (2008) 61 *Stanford Law Review* 203; OLM Ferraz, ‘Poverty, Inequality and the Law: How to Interpret Social and Economic Rights?’, unpublished manuscript, on file with the author.

<sup>71</sup> Khosla emphasises this point strongly in relation to the Indian jurisprudence: see M Khosla, ‘Making Social Rights Conditional: Lessons from India’ (2010) 8 *International Journal of Constitutional Law* 739.

to which it gives rise tends to be a common feature of almost all liberal democratic constitutional systems, it is likely that, in the short to medium term at least, social rights review will develop in different ways in different states. Already, it is clear that there are a diverse number of different modes of social rights review in existence.<sup>72</sup> While the South African ‘reasonableness review’ and the related ‘reasonable progression’ approach of the UN Committee on Economic, Social and Cultural Rights (as set out in its General Comment No 3 to CESCR) are probably the best-known modes of review in this context, other models also exist which may provide a more attractive template in states where the interplay of the boundary conditions makes ‘reasonableness review’ a less attractive option. Furthermore, substantial differences of view exist as to how social rights review should be structured and given effect: this again means that it is likely that different variants of social rights review will continue to co-exist, at least until the pros and cons of different variants become more apparent over time.

#### VII. QUESTIONING UNIFORMITY: THE CASE FOR DIVERSITY IN SOCIAL RIGHTS REVIEW

The pressure exerted by the ‘social rights problematic’ may therefore ensure that greater scope opens up for courts to play a role in directly or indirectly protecting social rights, but it does not necessarily mean that there will be convergence upon a particular mode of social rights review, at least in the short to medium term. A single ‘general model’ of *civil and political rights* review has developed over the last few decades, whereby courts apply concepts such as proportionality and deference in a similar manner in different jurisdictions:<sup>73</sup> however, it should not be assumed that a similar ‘general model’ will emerge in the context of *social rights* review. The variations between states, and the lack of consensus that exists as to how best to structure and give effect to social rights review, makes it likely that diversity will trump uniformity in this context: whereas the ‘general model’ has come to dominate in the field of civil and political rights review, it is possible that multiple different modes of review will emerge in the field of social rights.

NGOs and activists campaigning for enhanced legal protection for social rights often overlook the factors that help to create this diversity. Thus, for example, in the United Kingdom, various proponents of social rights review have argued that social rights review in the British context should be modelled on the South African approach, ie for courts to be given the power to assess the ‘reasonableness’ of resource allocation decisions in the socio-economic field.<sup>74</sup> However, this would involve a radical transformation of the limited constitutional role currently assigned to the UK judiciary. Furthermore as Keith Ewing has argued, the continental European mode of social rights protection may ‘fit’ better with the legal traditions of the United Kingdom and the socio-economic

<sup>72</sup> Contrast the dignity-based ‘basic minimum’ jurisprudence of the German Constitutional Court as applied in cases such as *Hartz IV* with the ‘non-regression’ case law of the Portuguese courts as applied in the ‘austerity’ cases mentioned in n 59. See also the distinction between the ‘conditional’ approach of the Indian courts and the ‘systemic’ approach of the South African courts that Khosla discusses, *ibid*.

<sup>73</sup> Kai Möller describes this as the ‘global model of constitutional rights’: see K Möller, *The Global Model of Constitutional Rights* (Oxford, OUP, 2012).

<sup>74</sup> See eg the views of the Joint Committee on Human Rights, *A Bill of Rights for the UK?* (29th report), (2007–08, HL 165-I/HC 150-I, 10 August 2008) 43–56.

ordering of its society.<sup>75</sup> For example, the approach of the German Constitutional Court in *Hartz IV* certainly goes much further than any UK court has done in protecting social rights by reference to the concept of human dignity: however, it is closer to the approach adopted by the UK courts in judgments such as *Limbuela* than is South African-style reasonableness review, and consequently is more likely to elicit a sympathetic response from constitutional actors in the United Kingdom.

Academic commentators also often overlook this diversity in analysing the development of social rights review. The wave of literature published over the last decade on social rights has tended to focus upon a few jurisdictions, in particular South Africa, India and Colombia. Much less attention has been paid to legal developments elsewhere, or to the manner in which different modes of social rights review both impact upon and are shaped by the socio-economic structure, constitutional culture and political climate of the states in which they take effect.

Furthermore, in much of this literature, 'reasonableness review', or its 'progressive realisation' cousin at UN level is often taken to be the gold standard or ideal mode of social rights review. It may indeed be the case that a 'reasonableness review' or a variant thereof is the best way to structure and give effect to full-blown social rights review from a normative perspective.<sup>76</sup> However, it is by no means certain that this mode of review can be transplanted into every legal system, or that it will necessarily be the most effective mode of giving substantive legal protection to social rights in every given context. Much again will depend on the 'boundary conditions' that shape how social rights review will function in any given society.

For example, in European societies with complex welfare systems, relatively well-functioning democratic accountability mechanisms, and a constitutional culture that has historically assigned courts a limited role in driving forward social change, it is difficult to see how wide-ranging reasonableness review could take root: the judiciary will not be able to transform existing social arrangements without endangering their legitimacy. However, a more constrained role focused on protecting individuals against denial of the 'minimum core' of social provision to which they are entitled by virtue of the principle of human dignity, similar to the approach of the German Constitutional Court in *Hartz IV*, would be easier to justify on the basis that the courts would be performing an analogous role in the context of social rights to that which they do in the context of civil and political rights. The same could be said for the 'incremental approach' proposed by Jeff King, whereby the courts would assess the justification of government measures affecting social rights by a process of analogous reasoning that draws upon existing established human rights standards.<sup>77</sup> Both these modes of social rights review would largely operate within the overall horizon of resource distribution fixed by the political process, instead of disrupting it with a view to bringing about wider social change. As such, they would fall short of the aspirations of transformative constitutionalism as it has developed in South Africa, India and Latin America, but fit better with the constitutional culture of European states. As a result, these more modest forms

<sup>75</sup> K Ewing, 'Book Review: E Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act*' (2009) 7 *International Journal of Constitutional Law* 155.

<sup>76</sup> For a comprehensive overview of the South African jurisprudence, see S Liebenberg, *Socio-economic Rights: Adjudication under a transformative constitution* (Claremont, Juta, 2010); for a dissenting take on the reasonableness test, see D Bilchitz, *Poverty and Fundamental Rights* (Oxford, OUP, 2007).

<sup>77</sup> J King, *Judging Social Rights* (Oxford, OUP, 2012).

of review may provide more effective protection for social rights review in the specific context of Europe than might the introduction of reasonableness review, even though the opposite might be true in the societies of the Global South.

In general, as Ferraz has argued, social rights review must ultimately operate by reference to a conception of what constitutes a fair distribution of resources that has some foundation in social consensus, at least at an abstract level: the concept of basic needs satisfaction, whether conceptualised in terms of a 'minimum core' or 'progressive realisation' may be too vague to provide a coherent basis for such review to be sustained successfully over time, unless courts can refer to a common understanding of what individuals are entitled to receive under a just system of resource allocation. Furthermore, constitutional culture will usually establish certain expectations as to the appropriate role of courts, while other background conditions will inevitably play a key role in determining the effectiveness of whatever mode of social rights review takes effect in any given legal system. As these background conditions vary from state to state, along with notions of what constitutes a fair distribution of resources, it is likely that what will constitute an effective mode of social rights review will also vary from state to state.

## VIII. CONCLUSION

The argument that has been made in this chapter is simple to summarise. Orthodox constitutional thought draws a distinction between civil and political rights on the one hand, and social rights on the other: courts are expected to play an active role in enforcing respect for the former, but not the latter. This orthodoxy remains very influential, but has also become problematised: the intertwined and interdependent nature of both sets of rights makes it difficult to maintain a coherent and stable distinction between 'legitimate' civil and political rights review and 'illegitimate' social rights review. This 'social rights problematic' has become a recurring feature of debates about constitutionalism. It also has given rise to different modes of social rights review, and this may be a context where diversity trumps uniformity: it may be better to create tailor-made systems of social rights protection for specific jurisdictions than to try to identify a general model of best practice.

Much of this may seem uncontroversial to the casual reader. However, much of the literature on social rights review consists of attempts to identify how a generic mode of social rights review should function: for example, many pages have been devoted to discussing the merits of 'strong' versus 'weak' rights and remedies in this context, with a considerable amount of the discussion being based on the assumption that there exists a best practice model of social rights review which can be transplanted into various legal systems. This assumption is highly questionable. National contexts vary greatly, and it may be the case that home-grown modes of social rights review engineered to address specific problem in a given state may be more effective than generic alternatives.





# *A South African Perspective on the Judicial Development of Socio-Economic Rights*

EDWIN CAMERON\*

## I. INTRODUCTION

**M**ANY OF THE arguments in current discussions about the justiciability of social and economic human rights echo the debate in South Africa at the time its Constitution was drafted. In South Africa, the proponents of full judicial oversight won a two-fold victory – socio-economic rights were not merely included in the Bill of Rights; they became fully justiciable rights, and not merely directive principles.

The Bill of Rights (which applies to all law, and binds the legislature, the executive, the judiciary and all organs of state, and binds natural and juristic persons ‘if and to the extent that, [a right] is applicable’) thus includes rights of access to housing,<sup>1</sup> to health care, food, water and social security,<sup>2</sup> and to education.<sup>3</sup>

But many of the arguments opposing constitutionalisation remain pertinent, both for South Africa’s nascent socio-economic rights jurisprudence and for other jurisdictions considering the best approach to socio-economic rights. The South African Constitutional Court’s approach to these rights has answered some of those early sceptical challenges. Others remain.

\* I am greatly indebted to my former law clerks, Dr Nick Ferreira and Claire Avidon, for extensive work in helping draft this contribution, and to Nurina Ally for helping finalise it, and in particular for drafting the section ‘The South African approach in comparative perspective’.

<sup>1</sup> Section 26 of the Constitution.

<sup>2</sup> Section 27 of the Constitution.

<sup>3</sup> Section 29 of the Constitution.

## II. OBJECTIONS TO SOCIO-ECONOMIC RIGHTS

Infused with theoretical questions about the nature of socio-economic rights, the two main kinds of objections pressed<sup>4</sup> against including socio-economic rights in the Constitution<sup>5</sup> that seem to retain some purchase are:

- (a) capacity; and
- (b) legitimacy.

### A. Judicial Capacity

One prominent source of doubt about the justiciability of socio-economic rights is scepticism about the practical capacity of judges to do the job.

The doubts seem to arise from three sources – judges' professional training as lawyers, which is directed at the successful assertion of contested positions; the form in which these questions reach them, which springs from the adversarial, two-sided nature of most litigation; and the lack of resources in the adjudication process for properly considering policy-directed decisions.

Socio-economic rights, it is argued, require courts to make complex policy decisions. These are said to be not two-sided, and thus amenable to decision in adversarial contest, but multi-centred, or 'polycentric' – that is, they involve problems that have complex interacting centres of tension. A polycentric task entails 'the coordination of mutually interacting variables: a change in one variable will produce changes in all the others'.<sup>6</sup> Choosing any solution will inevitably have consequences for other reasons and priorities. In the result, a broad focus is required, and not only on the rights and wrongs as they appear to emerge from two contesting parties' positions in opposed litigation.

The argument is that problems of this kind are poorly suited to judicial resolution. Courts are best equipped to resolve disputes between parties. This requires assessing competing arguments and determining the winner. By contrast the executive and legislature, with their access to empirical evidence and sensitivity to many competing demands, are said to be better suited to polycentric decision-making, which entails the ability to make broad judgements about the best solutions to complex problems. In particular, it requires the careful allocation of scarce resources.

While any justiciable right entails some polycentric elements, the degree of polycentricity is said to be especially high in socio-economic rights litigation.

<sup>4</sup> Many of these were trenchantly raised by Dennis Davis in his article 'The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 *South African Journal on Human Rights* 475. Perhaps surprisingly, many of the objections to the inclusion of justiciable socio-economic rights in the South African Bill of Rights came from the left. Marxists like my friend Dennis might have believed that the interests of the working class and poor would be safer in the hands of the new democratic government than in those of the notoriously conservative South African judiciary. This assumption has turned out to be false.

<sup>5</sup> F Michelman, 'The Constitution, Social Rights, and Liberal Political Justification' (2003) 13 *International Journal of Constitutional Law* 13–34, sets out three possible theoretical objections to the constitutionalisation of social rights – institutional, contractarian, and majoritarian.

<sup>6</sup> I Currie and J De Waal, *The Bill of Rights Handbook*, 5th edn (Cape Town, Juta, 2005) 569.

During the constitutional process, Dennis Davis cast doubt on 'the ability of judges inevitably to come up with one particular answer or to perform as Platonic philosopher-kings . . . who know the truth and inevitably arrive at the correct solution'.<sup>7</sup> He argued that the judicial interpretation of socio-economic rights inevitably entails policy choices; for this reason judicial interpretation of socio-economic rights is less predictable than that of civil and political rights, because background norms are less contested when it comes to civil and political rights. It follows that judges are not equipped to make the kinds of decisions required by socio-economic rights litigation.

But much of this seems doubtful. The suggestions that judicial decisions on other issues are more predictable and that 'background norms' in other areas are less contested seem unsubstantiated. Given this, the challenge to judges' capacity to make sound decisions in socio-economic rights litigation mirrors the overall debate about judges making decisions with major public impact.

Nevertheless, the complaint that institutional incapacity (by training, process and resource-limitation) inhibits reliable decision-making by judges in this area has substance. As my discussion of the South African case law will try to demonstrate, however, much depends on *how* the courts exercise their powers in socio-economic rights cases.

## B. Legitimacy

Another prominent concern about the justiciability of socio-economic rights stems from the separation of powers. Opponents point out that socio-economic rights require courts to direct the way government allocates state resources. Granting remedies in socio-economic rights litigation will therefore have significant budgetary and policy implications. This gives courts the power to specify how other branches of government distribute their resources, thereby making budgetary allocations and other policy decisions susceptible to judicial intervention.

Because the judiciary is unelected and unrepresentative, it is argued that it is not democratically legitimate for courts to make decisions of this kind. Dennis Davis argues that socio-economic rights 'straddle the divide between rights and politics and for this reason present greater legal difficulties than first-generation rights'.<sup>8</sup>

This also is open to contest. It appears to invoke the misleading distinction between 'positive' and 'negative' rights, which the South African debate eventually escaped. In the United States Judge Richard Posner has said that in 'most American constitutional law circles' it is regarded 'as bedrock truth'<sup>9</sup> that the US Constitution 'is a charter of negative rather than positive liberties. The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them'.<sup>10</sup>

<sup>7</sup> Above n 4, 483.

<sup>8</sup> *ibid*, 487.

<sup>9</sup> G Alexander, 'Socio-Economic Rights in American Perspective: The Tradition of Anti-Paternalism in American Constitutional Thought' in AJ Van der Walt (ed), *Theories of Social and Economic Justice* (Cape Town, Sun Press, 2005) 7.

<sup>10</sup> *Jackson v City of Joliet*, 715 F 2d 1200, 1203 (7th Cir 1983) (United States).

But as Henry Shue,<sup>11</sup> Sandra Fredman<sup>12</sup> and others have shown, the distinction is both conceptually and practically unsound. Human rights of all kinds give rise to both positive and negative duties.<sup>13</sup> The supposed distinction between positive and negative rights is too crude to do the work sceptics about socio-economic rights ask it to do.

Once this is seen, the question whether it is proper for judges to decide socio-economic rights cases is coordinate with the question whether it is proper for them to decide any politically contested cases at all.

Here various defences of the judicial role are pertinent, including Ronald Dworkin's 'constitutional conception of democracy'. Dworkin denies that collective decisions must always or normally be those that a majority would favour if fully informed or rational.<sup>14</sup> Dworkin argues instead that the defining aim of democracy is that collective decisions be made by institutions whose structure, composition and practices treat all members of the community with equal concern and respect. For Dworkin, therefore, it will sometimes be more in accordance with democratic values for unelected officials (as judges) to be entrusted with certain decisions. Judicial review should not therefore be seen as a compromise with democracy, but rather as essential to it.

The argument that socio-economic rights are inherently vague and indeterminate also cannot be sustained, since other 'first generation' or 'negative' rights are no less vague. Etienne Mureinik contended powerfully that these challenges reduced to the same problem: that there are many different ways to realise socio-economic rights and courts lack the expertise and the legitimacy to decide among them.<sup>15</sup> However the solution, according to Mureinik, lay not in relegating socio-economic rights to directive principles or omitting them from the Constitution entirely. A proper understanding of the nature of judicial review, according to Mureinik, alleviated these concerns.

For Mureinik, at the heart of socio-economic rights reviews is an inquiry into the justification of the measure in question. Courts are entitled to ask government to explain how it envisages achieving, say, access to housing, given that a commitment to providing housing to South Africans is part of our constitutional order. Mureinik argued that this process in itself would improve the quality of government decisions. Even if no measure was struck down substantively, the procedural benefits of judicial scrutiny would have been significant: 'any decision maker who is aware in advance of the risk of being asked to justify a decision will always consider it more closely than if there were no risk'.<sup>16</sup>

In South Africa, arguments of this kind proved persuasive. The drafters included socio-economic rights. However, they subjected the rights in question to considerable internal qualification. Thus, there is no 'right to housing', but only a *right of access* to adequate housing, and to health care, food, water and social security. In each case, that right is partnered with an internal limitation in the sub-section immediately following. This requires the state to 'take reasonable legislative and other measures, within its

<sup>11</sup> H Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, 2nd edn (Princeton NJ, Princeton University Press, 1996).

<sup>12</sup> S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford, OUP, 2008).

<sup>13</sup> Taken on its own, the distinction between positive and negative duties is also inadequate to wholly represent the range of obligations arising from human rights. Section 7(2) of the South African Bill of Rights provides that 'the state must respect, protect, promote and fulfil the rights in the Bill of Rights'.

<sup>14</sup> R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford, OUP, 1996) 17–19.

<sup>15</sup> E Mureinik, 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *South African Journal on Human Rights* 464, 468.

<sup>16</sup> *ibid*, 471.

available resources, to achieve the progressive realisation' of the right in question.<sup>17</sup> A 'right of access' to a social good is clearly less tangible, and therefore less immediately exigible, than a right to the same good. The drafting change was deliberate. The intention was to create a graduated series of entitlements that would not subject government to immediate demands and constraints.

Alone, the right to basic education is not constrained by these limitations.<sup>18</sup> The drafters included the direct right to basic education, rather than only a right of access. The right to further education is however constrained by an internal limitation clause that provides that 'the state, through reasonable measures, must make [further education] progressively available and accessible'.<sup>19</sup> This injunction is less restricted than that applying to the other rights. It is plain, and accepted in the South African jurisprudence, that there is a difference between a 'right to' something, which generally represents an immediately exigible entitlement to it, and the constitutional 'right of access to' something, which represents a lesser, graduated entitlement.<sup>20</sup>

### III. SETTING THE STANDARD FOR JUDICIAL REVIEW

In *Soobramoney*, its first case involving socio-economic rights, the Constitutional Court set out the groundwork for its approach. Chaskalson P held that '[a] court will be slow to interfere with rational decisions taken in good faith by political organs and medical authorities whose responsibility it is to deal with such matters'.<sup>21</sup> Mr Soobramoney challenged government's policy that limited dialysis to patients with acute renal failure who could be *successfully* treated. Since his condition was irreversible, and government's resources to provide services limited, dialysis would only prolong his life while it would thereby be denied to others who had a better chance of survival. The Constitutional Court was unable to find that the policy infringed Mr Soobramoney's rights. He died soon after.

Three years later in *Grootboom*, the Court developed its standard of review for reasonableness in socio-economic rights litigation.<sup>22</sup> It ruled that the Constitution did not create a right to 'shelter or housing immediately upon demand'.<sup>23</sup> However, it found that the impugned government housing programme was unreasonable because it failed to provide for relief for those people in the most desperate need of housing.<sup>24</sup> It granted a declarator to this effect, although no direct relief to the individual claimants.<sup>25</sup> Mrs Grootboom, the principal applicant, died some years later, without government

<sup>17</sup> See ss 26(2) and 27(2) of the Bill of Rights.

<sup>18</sup> See *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (South Africa) para 37.

<sup>19</sup> See s 29(1) of the Constitution.

<sup>20</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC) (South Africa) paras 21–26. The author was party to this decision as an acting Justice of the Court in 1999–2000.

<sup>21</sup> *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17; 1998(1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) (South Africa).

<sup>22</sup> *Grootboom* (above n 20).

<sup>23</sup> *ibid*, para 95.

<sup>24</sup> *ibid*, para 69.

<sup>25</sup> On this aspect of the decision, see E Cameron 'What You Can Do with Rights' (2012) 2 *European Human Rights Law Review* 148–61.

housing, although government radically revised its overall housing delivery programme in response to the judgment.

Less than two years after *Grootboom*, the Constitutional Court applied this approach in *TAC*,<sup>26</sup> the undoubted high point of its socio-economic rights jurisprudence.

The Treatment Action Campaign challenged government's refusal to provide Nevirapine to pregnant HIV-positive women to prevent mother-to-child transmission. At the time of the litigation, Nevirapine was part of government's response to the AIDS pandemic, but was available only at a few pilot sites, rather than throughout the public health system. The drug had been approved as safe through the normal government channels; it had been shown to be effective in preventing mother-to-child transmission even when administered in a single dose through simple, non-intrusive means; and the supplier had offered an unlimited supply free of charge.

As it had done in *Soobramoney* and *Grootboom*, the Court rejected the notion that socio-economic rights established a 'minimum core' to which every person was entitled.<sup>27</sup> The Court again emphasised that all that is expected of the state is 'that it act reasonably to provide access' to social and economic rights.<sup>28</sup> It found that government policy confining the provision of Nevirapine to a few research and training sites failed to address the needs of mothers and their newborn children who did not have access to those sites. Government's attempts to justify the restriction were unpersuasive. It was therefore unreasonable and unconstitutional. The Court ordered government to remove restrictions preventing Nevirapine from being made available at public hospitals for the purpose of preventing mother-to-child transmission of HIV.

The Court in *TAC* also expressly conceded and endorsed sceptics' reservations about socio-economic rights:

Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way, the judicial, legislative and executive functions achieve appropriate constitutional balance.<sup>29</sup>

Judicial review of government's social programmes for reasonableness has thus become the hallmark of South Africa's socio-economic rights jurisprudence.

Sunstein characterises this approach as 'novel and exceedingly promising'.<sup>30</sup> Sunstein argues that the Constitutional Court's approach to socio-economic rights 'is respectful of democratic prerogatives and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met'.<sup>31</sup>

Like Mureinik, Sunstein highlights the beneficial consequences of the burden of justification that review for reasonableness imposes on government in its attempts to realise

<sup>26</sup> *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (South Africa).

<sup>27</sup> *ibid*, paras 26–29.

<sup>28</sup> *ibid*, para 35.

<sup>29</sup> *ibid*, para 38.

<sup>30</sup> C Sunstein, *Designing Democracy* (Oxford, OUP, 2001) 221.

<sup>31</sup> *ibid*.

socio-economic rights.<sup>32</sup> The Constitutional Court's approach appears to have persuaded Sunstein that 'a democratic constitution, even in a poor nation, is able to give some protection to those rights, and to do so without placing an undue strain on judicial capacities'.<sup>33</sup>

Importantly, the Court's review of rights provides a forum for reasoned debate on contested issues of public policy.<sup>34</sup> The dramatic institutional and operational force of the TAC decision illustrates this precisely.<sup>35</sup>

Brian Ray contends that the Constitutional Court has effectively adopted a mixed form of review, best described as 'policentric' (vs 'polycentric'), in which the distinctive characteristic is 'a sharing of interpretive authority with the legislative and executive branches of government and a consequent willingness by courts to respect constitutional interpretations by those branches that differ from their own'.<sup>36</sup>

Ray argues that the benefits of the Constitutional Court having adopted this form of review are significant:

- first, it enhances courts' decision-making capacities by giving them the benefit of the other branches' perspectives on policy choices;
- second, it creates incentives for the other branches to take seriously their own roles in enforcing these rights by recognising their authority to develop independent interpretations of what these rights require; and
- finally, it allows the courts to be flexible in choosing weaker or stronger remedies on a case-by-case basis.<sup>37</sup>

#### IV. CRITICAL ANALYSIS OF THE CONSTITUTIONAL COURT'S APPROACH TO SOCIO-ECONOMIC RIGHTS

Two recent decisions in socio-economic rights cases illustrate the Constitutional Court's approach. Both have attracted criticism as setting back South Africa's socio-economic rights jurisprudence.<sup>38</sup>

##### A. *Mazibuko v City of Johannesburg*

In *Mazibuko*,<sup>39</sup> the applicants challenged the City of Johannesburg's free basic water policy. They argued that the City's free basic water allowance of 6 kilolitres per household per month infringed their rights of access to water and to dignity and equality. They succeeded in the High Court, securing an order that the right to water entailed a free basic water supply of 50 litres per person per day. On appeal that amount was

<sup>32</sup> *ibid*, 234.

<sup>33</sup> *ibid*, 237.

<sup>34</sup> K O'Regan, 'A Forum for Reason: Reflections on the Role and Work of the Constitutional Court', Helen Suzman Memorial Lecture, 22 November 2011: [www.hsf.org.za/siteworkspace/helen-suzman-memorial-lecture-november-2011.pdf](http://www.hsf.org.za/siteworkspace/helen-suzman-memorial-lecture-november-2011.pdf) (accessed 13 May 2012).

<sup>35</sup> Cameron, (above n 25) 154–57.

<sup>36</sup> B Ray, 'Policentrism, Political Mobilization, and the Promise of Socioeconomic Rights' (2009) 151 *Stanford Journal of International Law* 153.

<sup>37</sup> *ibid*, 154.

<sup>38</sup> The author was party to both decisions.

<sup>39</sup> *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) (South Africa).



reduced by the Supreme Court of Appeal to 42 litres per person per day. But this was still a significant victory for the applicants.

The Constitutional Court overturned the judgments of both lower courts, finding that the City's free basic water policy was reasonable. The Court refused to give a quantified content to the right to water, holding that this would not be appropriate. It revisited its approach to socio-economic rights and affirmed the approach that it had taken in *Grootboom*, *TAC* and subsequent cases. It found that the right to water

does not require the state upon demand to provide every person with sufficient water without more; rather it requires the state to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources.<sup>40</sup>

The Court found that

ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.<sup>41</sup>

The Court pointed out that its orders in *Grootboom* and *TAC* illustrated

institutional respect for the policy-making function of the two other arms of government. The Court did not seek to draft policy or to determine its content. Instead, having found that the policy adopted by government did not meet the required constitutional standard of reasonableness, the Court, in *Grootboom*, required government to revise its policy to provide for those most in need and, in *Treatment Action Campaign No 2*, to remove anomalous restrictions.<sup>42</sup>

It summarised its approach to socio-economic rights cases:

[T]he positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom*, it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions, as in *Treatment Action Campaign No 2*, the Court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.<sup>43</sup>

The High Court and the Supreme Court of Appeal had overlooked these considerations, and thus erred by quantifying the content of the right.

Finally, the Constitutional Court endorsed a vision of the role and purpose of socio-economic rights litigation that accords with the approach of Mureinik and Sunstein. This passage of *Mazibuko* is worth quoting at length:

<sup>40</sup> *ibid*, para 50.

<sup>41</sup> *ibid*, para 61.

<sup>42</sup> *ibid*, para 65.

<sup>43</sup> *ibid*, para 67.

The outcome of the case is that the applicants have not persuaded this Court to specify what quantity of water is 'sufficient water' within the meaning of section 27 of the Constitution. Nor have they persuaded the Court that the City's policy is unreasonable. The applicants submitted during argument that if this were to be the result, litigation in respect of the positive obligations imposed by social and economic rights would be futile. It is necessary to consider this submission.

The purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing, litigation of this sort fosters a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy.

When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government. Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions. This understanding of social and economic rights litigation accords with the founding values of our Constitution and, in particular, the principles that government should be responsive, accountable and open.

Not only must government show that the policy it has selected is reasonable, it must show that the policy is being reconsidered consistent with the obligation to 'progressively realise' social and economic rights in mind. A policy that is set in stone and never revisited is unlikely to be a policy that will result in the progressive realisation of rights consistently with the obligations imposed by the social and economic rights in our Constitution.

This case illustrates how litigation concerning social and economic rights can exact a detailed accounting from government and, in doing so, impact beneficially on the policy-making process. The applicants, in argument, rued the fact that the City had continually amended its policies during the course of the litigation. In fact, that consequence of the litigation (if such it was) was beneficial. Having to explain why the Free Basic Water policy was reasonable shone a bright, cold light on the policy that undoubtedly revealed flaws. The continual revision of the policy in the ensuing years has improved the policy in a manner entirely consistent with an obligation of progressive realisation.<sup>44</sup>

## ***B. Nokotyana v Ekurhuleni Metropolitan Municipality***

In *Nokotyana*,<sup>45</sup> the applicants sought an order compelling their municipality to provide them with high-mast lighting and temporary sanitation facilities in the informal settlement in which they lived, pending a decision on whether the settlement would be upgraded on-site, or the residents offered housing at a new site. In particular, they sought a court order granting them one 'ventilated improved pit' (VIP) latrine per household, rather than the one chemical toilet per 10 families offered to them by the municipality. They relied on their right of access to adequate housing, arguing that adequate sanitation was a component of the right.

<sup>44</sup> *ibid*, paras 159–63.

<sup>45</sup> *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* [2009] ZACC 33; 2010 (4) BCLR 312 (CC) (South Africa).

The government respondents argued that it was impractical to invest in VIP latrines before the decision whether the settlement should be upgraded on-site had been taken. This would amount to a significant investment which would be wasted if a decision to relocate the settlement were taken.

There were significant problems with the litigation. First, the provincial government, which was responsible for processing the application for upgrade, was not joined in the proceedings before the High Court, meaning that the High Court was deprived of its evidence. The Constitutional Court remedied this failure by joining the province. Secondly, the remedy sought and the arguments advanced substantially before the Constitutional Court were not put before the lower court. In the High Court, the applicants had not challenged the policy of the municipality. Instead they sought in the Constitutional Court to persuade the Court to grant them relief, relying directly on the constitutional right to housing. But the government respondents were not called upon to defend their policy in the High Court, and consequently that court had not had the chance to consider any evidence regarding the reasonableness of the policy. This put the Constitutional Court in an impossible position, requiring it to sit as a court of first and final instance on questions that ought to have been thrashed out in the courts below. The problem was exacerbated by the applicants' unsuccessful attempt to introduce controversial new evidence.<sup>46</sup> Finally, at the hearing counsel for the applicants boldly but implausibly urged the Court to overturn its entire socio-economic rights jurisprudence on the basis that *Grootboom* was not only wrong, but clearly wrong, and instead adopt the minimum core approach.

The appeal was dismissed. Far from overturning *Grootboom*, the Court did not consider that the applicants had made a persuasive case. Reliance on several constitutional provisions was held to be insufficiently specified and inappropriate. The Court did not pronounce on the reasonableness of the local authority's newly adopted policy, since it was inappropriate to consider a case so fundamentally changed on appeal. However, the Court did order the province to take the decision on the municipality's application for the upgrade of the settlement within 14 months of judgment.

### C. Criticisms

Both judgments have provoked ire.<sup>47</sup> Poignantly, Sandra Liebenberg characterises *Mazibuko* as illustrative of 'the shortcomings of reasonableness review unmoored from a substantive analysis of the normative purposes and values underpinning the relevant socio-economic rights'.<sup>48</sup> Justifiably, Liebenberg argues that the Court has retreated

<sup>46</sup> The new evidence addressed, inter alia, the extent of sanitation provision across the country; the negative consequences of poor sanitation on health, the economy and education; the link between HIV/Aids and water; and the costs of providing the latrines. Because of the late attempt to introduce the evidence, none of the respondents had the opportunity to respond to it.

<sup>47</sup> See for example P De Vos, 'Water Is Life (But Life Is Cheap)', *Constitutionally Speaking* (13 October 2009): [constitutionallyspeaking.co.za/water-is-life-but-life-is-cheap/](http://constitutionallyspeaking.co.za/water-is-life-but-life-is-cheap/) (accessed on 12 May 2013). The *Mazibuko* judgment was said by Pierre de Vos to 'represent a retreat for the Court from its hey-day when (in the TAC case) it ordered the state to take steps to make Nevirapine available'. He said that the Court endorsed 'the neo-liberal paradigm of water provision adopted by the city, a policy which would often deny poor people access to adequate water because they would be unable to pay for the water needed to live'.

<sup>48</sup> S Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Cape Town, Juta, 2010) 467.

from a substantive reasonableness standard and instead taken a deferential approach to the assessment of the reasonableness of government's water policy.<sup>49</sup>

The effect of a 'deferential and normatively thin concept of reasonableness review' is to weaken 'the capacity of socio-economic rights jurisprudence to contribute meaningfully to transformative social change'.<sup>50</sup> Contrasting the *Mazibuko* judgment with the Court's earlier socio-economic rights jurisprudence, Liebenberg finds it 'regrettable' that in *Mazibuko* the Court chose to place a narrow construction on what had the potential to develop into 'a rich, substantive set of normative criteria for guiding fundamental social and economic reforms in South Africa'.<sup>51</sup>

Equally, *Nokotyana* has been criticised for amounting to, at best, a 'perilous retreat from the court's fairly progressive jurisprudence on socio-economic rights, generally ossifying the overly deferential'.<sup>52</sup> At worst, Redson Kapindu argues, the decision amounts to an 'abdication of the court's role as the final arbiter in interpreting and applying the provisions of the Constitution, a process that necessarily suggests clarifying the meaning and content of all rights guaranteed under the Constitution'.<sup>53</sup>

David Bilchitz warned that the *Nokotyana* and *Mazibuko* judgments demonstrated the shortcomings in the Constitutional Court's approach to socio-economic rights and 'suggest that the potential of social rights to further the interests of the poor is being seriously weakened'.<sup>54</sup> The Court is again accused of 'taking refuge in legal technicalities' and ignoring the concrete suffering of poor applicants.

Bilchitz also argued that the Court over-emphasises separation of powers concerns:

[J]udges worry that their orders may end up usurping the power of democratically elected organs of state in areas where they (the judges) lack expertise and legitimacy. But courts are tasked with a specialised role in social rights cases: to ensure that the interests of those most economically vulnerable are catered for in the programmes adopted by other branches of government. Unfortunately, the body of case law that is being developed involves an abdication of the responsibility our constitution gives to judges, by placing deference to government above the vulnerability of individuals.<sup>55</sup>

These commentators interpret the two judgments as signifying a more executive-minded Court, one disposed to defer to government on the reasonableness of programmes. Eschewing these admonitions, the Court has now clearly affirmed the limits of its own interventive role in government delivery of socio-economic rights.<sup>56</sup> And in doing

<sup>49</sup> *ibid.*, 466–80.

<sup>50</sup> *ibid.*, 480.

<sup>51</sup> *ibid.*

<sup>52</sup> RE Kapindu, 'The Desperate Left in Desperation: A Court in Retreat – *Nokotyana v Ekurhuleni Metropolitan Municipality* Revisited' (2010) 3 *Constitutional Court Review* 201, 201.

<sup>53</sup> *ibid.*

<sup>54</sup> D Bilchitz, 'What Is Reasonable to the Court Is Unfair to the Poor', *Business Day* (16 March 2010).

<sup>55</sup> *ibid.* Professor Bilchitz's claim that the Court's refusal to allow new evidence in support of a new remedy on appeal for the first time amounts to a formalistic 'hangover from . . . apartheid legal culture' is extravagant. On this view, the Court ought to have assessed a highly complex national policy decision on the basis of controversial evidentiary assertions to which the state was never able to respond and without the benefit of lower-court factual findings and assessment. To insist that challenges to government policy be properly argued and litigants given a fair chance to respond to detrimental evidence is not undue formalism, but elementary.

<sup>56</sup> J Dugard and M Langford, 'Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism' (2011) 27 *South African Journal on Human Rights* 39 (using *Mazibuko* and *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (4) SA 55 (CC); 2010 (3) BCLR 212 (CC) (South Africa) as case studies, the authors contend that the public impact litigation process is generally too unpredictable and diffuse to pursue a formulaic or scientific approach to assessing its likely success.

so, it has allayed the fears of the socio-economic rights sceptics. The Constitutional Court has consistently endorsed the importance of the principle of the separation of powers in its assessment of socio-economic rights claims. But this has led critics to charge that it avoids treading on the toes of the executive.

Yet institutionally and politically this is surely the Court's proper place – continual review, close scrutiny of government programmes, insistence on attention to the poorest, but leaving a wide margin for democratic institutions to shape the content of the rights within the mandate the voters confer.

## V. CRAFTING APPROPRIATE REMEDIES IN SOCIO-ECONOMIC RIGHTS CASES

As contested as the Court's role is in adjudicating socio-economic rights, so are the remedies that it has sought to craft.

### A. Positive Remedies

Notwithstanding the scepticism about positive enforcement of socio-economic rights, *Grootboom* and *TAC* found that the Constitution obliged government to take steps, within available resources, to positively realise the rights at stake.

More recently, in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*,<sup>57</sup> the Court gave a practically significant order that extended protection to a wide class of urban dwellers with insecure title who face homelessness as a result of private-sector evictions. The Court considered the inter-relationship between the constitutional prohibition against arbitrary deprivation of property, the right of access to adequate housing, and the obligation of local government to provide temporary emergency housing, where persons are evicted from premises unlawfully occupied. At issue was eviction of unlawful occupiers from privately-owned property. The Court found that it was not reasonable for the City to provide temporary emergency accommodation to people rendered homeless as a result of state action, where for example the state relocates people from hazardous buildings, and yet deny the same to those rendered homeless by private eviction.

### B. Negative Remedies

The Court has not only positively enforced socio-economic rights, but has also granted remedies that inhibit violation of the rights.

In *Jaftha v Schoeman*, the Court was asked to consider the negative aspect of the right to adequate housing.<sup>58</sup> The applicants argued that unlike the other housing cases that

They point out that 'the litigation process delivered much more than the judicial decision' thereby recognising that the limitations on judicial process and decision-making can be overcome through litigation and social mobilisation that accompanies it.)

<sup>57</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC) (South Africa).

<sup>58</sup> *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) (South Africa) para 31.

had come before the Court, which sought to enforce the positive right to housing, they sought a remedy which would protect their right to housing by declaring invalid laws that prevent or impair their existing access to housing. Accordingly, the Court was required to consider whether the law which permits the sale in execution of people's homes because they have not paid their debts<sup>59</sup> violates the right to have access to adequate housing, which includes the right to security of tenure.<sup>60</sup>

The Court indeed found that the provision was overbroad and therefore unjustifiably violated the right to adequate housing. In remedying the defective provision, the Court ordered that there should be judicial oversight where immovable property will be executed against.<sup>61</sup> In addition, the Court set out the following factors which should be considered when permitting execution against immovable property by a judgment debtor: (a) the circumstances in which the debt was incurred; (b) any attempts made by the debtor to pay off the debt; (c) the financial situation of the parties; (d) the amount of the debt; (e) whether the debtor is employed or has a source of income to pay off the debt; and (f) any other factor relevant to the particular facts of the case before the court.<sup>62</sup>

In a similar case, the Court in *Gundwana*<sup>63</sup> was asked to decide whether the High Court registrar, in granting default judgment,<sup>64</sup> could constitutionally be entrusted with the power to declare mortgaged property that is a person's home specially executable, where the mortgaged property was specifically and willingly put up as security for the debt. The alternative was to require direct judicial supervision of all such orders.

The Court upheld the alternative. It found that

the willingness of mortgagors to put their homes forward as security for the loans they acquire is not by itself sufficient to put those cases beyond the reach of *Jaftha* [*v Schoeman*]. An evaluation of the facts of each case is necessary in order to determine whether a declaration that hypothecated property constituting a person's home is specially executable, may be made. It is the kind of evaluation that must be done by a court of law, not the registrar.<sup>65</sup>

Accordingly, the High Court rule was declared unconstitutional: judicial oversight is now required in every case where a home is at stake.

### C. Deliberative Remedies

Taking an even more creative approach to its remedies, the Constitutional Court in *Olivia Road*,<sup>66</sup> which concerned the eviction of more than 400 occupiers by the City of Johannesburg, ordered the City and the applicants

<sup>59</sup> See s 66(1)(a) of the Magistrate's Courts Act 32 of 1944.

<sup>60</sup> *Jaftha* (above n 58), para 1.

<sup>61</sup> *ibid*, paras 54–56.

<sup>62</sup> *ibid*, para 60.

<sup>63</sup> *Gundwana v Steko Development CC and Others* [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC) (South Africa).

<sup>64</sup> Default judgment is granted in terms of Rule 31(5)(b) of the Uniform Rules of Court. The Court noted in para 37 that '[t]he practice of ordering immovable property specially executable at the time of judgment arose on the basis of practical expediency, namely to circumvent the necessity of first executing against movables where immovable property had been specially hypothecated as security for the debt. The underlying basis for the lack of judicial control over the whole process of execution was that it was an "executive matter which is dealt with by the Registrar".'

<sup>65</sup> *Gundwana* (above n 63), para 49.

<sup>66</sup> *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) (South Africa).

to engage with each other meaningfully and as soon as it is possible for them to do so, in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.

Meaningful engagement was to include the determination of (a) what the consequences of the eviction might be; (b) whether the City could assist in alleviating those consequences; and (c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period. Both parties were required to report back to the Constitutional Court within a month on the results of the engagement.

After this process, the occupiers and the City concluded an agreement that set out measures to be taken to render the building safer and more habitable, including installing chemical toilets, cleaning and sanitation, delivery of refuse bags, closing a lift shaft and installing fire extinguishers. The City also agreed to provide the occupiers with alternative accommodation pending permanent housing solutions.

The Court's order was genuinely innovative. Conservative lawyers at the time scoffed at the idea of ordering 'meaningful engagement' – they weren't sure what it might mean, let alone how it could be supervised or enforced.<sup>67</sup> However, time has vindicated the judgment and its order. The order that the parties engage 'meaningfully' proved practically successful. It has also proven beneficial in other cases where seemingly intractable and acrimonious disputes between parties turn out to be soluble when they engage with one another. The order indicates a shift from the traditional view of adversarial litigation, in which one party 'wins' and the other party 'loses'. Forcing the parties to engage can result in beneficial compromise and reduce conflict and tension.

## VI. THE SOUTH AFRICAN APPROACH IN COMPARATIVE PERSPECTIVE

The cautious and incremental stance of South Africa's Constitutional Court contrasts with the more activist stance adopted by some courts elsewhere. The Supreme Court of India, for example, has given detailed content to state obligations in respect of socio-economic rights and has adopted palpably interventionist remedies.<sup>68</sup> With health care rights, this seems to be the case also in Brazil and some other Latin American countries.<sup>69</sup> A more surprising example is the interventionist approach the United States Supreme Court has at times demonstrated, a telling insight carefully detailed in Jeff King's contribution to this book ([chapter eighteen](#)).

King offers an intriguing thesis. He argues that judicial activism in social rights cases, in the United States and elsewhere, may partly be driven by apathy and failures in other branches of government – that is, by a generally low level of political commitment to the funding of welfare services or protection of social rights. In such circumstances, he suggests, the demand-side pressures produced by chronic failings in one institution result in reliance and a need for responsiveness from other institutions, such as courts. Given the

<sup>67</sup> See G Budlender, 'People's Power and the Courts' (Bram Fischer Memorial Lecture, 2011): [www.lrc.org.za/papers/1654-2011-11-11-bram-fischer-memorial-lecture-peoples-power-and-the-courts-by-geoff-budlender](http://www.lrc.org.za/papers/1654-2011-11-11-bram-fischer-memorial-lecture-peoples-power-and-the-courts-by-geoff-budlender) (accessed 13 July 2012).

<sup>68</sup> There is a wealth of literature on this topic. See, for example, J Fowkes, 'How to Open the Doors of the Court – Lessons on Access to Justice from Indian PIL' (2011) 27 *South African Journal on Human Rights* 434, 435–36 and further sources there cited.

<sup>69</sup> See J King, *Judging Social Rights* (Cambridge, CUP, 2012) 81–85.



severe difficulties facing the South African state in the delivery of social services, the Constitutional Court's experience may seem an outlier approach when compared with trends in other countries that seem to be similarly placed. At least three points may be made in a comparative exercise of this sort.

First, it might be wrong to compare South Africa's political context to one in which the government is either unwilling or utterly unresponsive to the need for the delivery of basic social goods. For all of its failings, government has succeeded in making massive social service deliveries since 1994. Indeed, King's analysis rightly concedes this in assessing South Africa's jurisprudence on social rights. As he states, nearly all the social rights cases he considers from Britain, Canada and South Africa are 'not caricatures of chronic administrative incompetence and political indifference'.<sup>70</sup> And in his work more generally, King characterises the political context in South Africa as one that more likely demonstrates a good-faith political commitment to protecting social rights.<sup>71</sup> This then may be an important point of distinction from other jurisdictions where courts have adopted a generally more activist role.

Secondly, while the Constitutional Court has demonstrated more restraint than some other courts, it would be wrong to say that on occasion the Court has not been bold and assertive. The Court has not shied away when government has failed to adopt reasonable measures at all, or where it has taken no steps to realise the rights in question. In appropriate cases, such as *TAC* and *Grootboom*,<sup>72</sup> the Court required government to formulate reasonable policies to cater for the worst off in society. Thus, the Court may be properly cautious but it certainly does not defer to government in all cases. This has led even those critics who consider the Court too cautious to concede that it is 'more pro-poor than government'.<sup>73</sup>

Thirdly, comparative lessons may in fact demonstrate the virtues of a less ambitious and more moderated approach. King points to instructive cases demonstrating how well-intentioned activist courts may not always yield the results that even those who advocate greater judicial protection of social rights desire. One example of the uncertain consequences that may emerge when a court intrudes too far into legislative and executive space is *Jenkins v State of Missouri*.<sup>74</sup> Here, in an effort to desegregate Kansas City

<sup>70</sup> That there is a measure of political will to enhance social rights is highlighted by the fact that since 1994 there has been palpable material improvement in people's lives. According to the South African Institute of Race Relations, the number of South Africans living on less than \$2 (about R16) a day has more than halved from 1994. More than three-quarters of households now live in formal housing. Over 80% of these houses are electrified and also have access to running water. See S Mnyanda, 'Why I Can't Vote for the ANC or the Opposition', *The Guardian* (1 October 2012): [www.guardian.co.uk/world/africa-blog/2012/oct/01/south-africa-elections-2014-vote](http://www.guardian.co.uk/world/africa-blog/2012/oct/01/south-africa-elections-2014-vote) (accessed on 12 May 2013).

<sup>71</sup> King (above n 69) 10–12.

<sup>72</sup> See also, for example, *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (South Africa).

<sup>73</sup> Pierre de Vos, a popular legal analyst and often trenchant critic of the Court's incremental approach, writes: 'In the *Grootboom* case, the *Treatment Action Campaign* case, the *Khosa* case, the *Jaftha* case, and the *Glenister* case the Constitutional Court handed down judgments that had the effect of extending social and economic rights benefits to the poor, protected them from discrimination and unfair treatment or placed duties on the government to fight corruption, the very corruption that disproportionately affects the lives of the poor and the marginalised who depend on the honest and efficient state to provide it with the minimum basic goods and services required for them to survive and live a meaningful life'. P De Vos, 'Constitutional Court More Pro-poor than the Government', *Constitutionally Speaking* (25 November 2011): [constitutionallyspeaking.co.za/constitutional-court-more-pro-poor-than-the-government/](http://constitutionallyspeaking.co.za/constitutional-court-more-pro-poor-than-the-government/) (accessed 12 May 2013).

<sup>74</sup> *Jenkins v State of Missouri*, 593 F Supp 1485 (WD Mo 1984) (United States). See also, the decision on appeal by the US Supreme Court in *Missouri v Jenkins*, 515 US 70 (1995) (United States).

schools, Judge Clark ordered a 6:4 ratio of black students to white students in schools. But, since the district in question could not fill all the 'white seats' in the designated schools, thousands of black children had to be placed on waiting lists, unable to attend the school of their choice, despite the availability of school spaces. The Judge had to eventually revisit the plan. Another striking example is from Brazil, where the courts have been willing to order the provision of drugs directly to claimants regardless of state budgetary constraints. At this stage, there is evidence to suggest that the litigation actually worsened health equity by diverting health resources from cost-effective treatment for the poor towards more expensive treatment for the wealthy.<sup>75</sup> This is not to say that all cases end up badly.

In the final section, I try to sketch out the lessons that I think may be gleaned from the South African experience.

## VII. LESSONS FOR OTHER JURISDICTIONS

The South African experience of judicial enforcement of social and economic rights suggests several lessons.

First, the judgments of the Constitutional Court allay concern about courts overreaching their powers. The model of review for reasonableness developed in South Africa demonstrates that there is nothing intrinsic to judicial enforcement of socio-economic rights that requires policy-making. The Court has been careful to circumscribe its role to the judicial review of law and policy for reasonableness. It is likely that courts elsewhere will be similarly reluctant to make detailed policy prescriptions.

Secondly, the South African model of review for reasonableness has also largely answered objections based on concerns about judicial capacity.

As Frank Michelman points out, 'reasonableness' is a standard that is uncontroversially justiciable in traditional areas of law like negligence.<sup>76</sup> Where, as in *Nokotyana*, applicants have invited the Court to assess policy without tendering admissible and tested evidence on its reasonableness, the Court has declined to do so. It is highly sensitive to its own limitations, and to the limitations of adversarial litigation as a method for determining policy.

Pertinent here is the Court's refusal to adopt a minimum core approach to socio-economic rights. Contending that this is wrong, Bilchitz argues that socio-economic rights give rise to two obligations: the first to realise a certain minimum provision without delay, and the second to improve the level of provision beyond the threshold by taking reasonable measures.<sup>77</sup> He offers an example of a ruling that might spell out the minimum core of the right to housing: 'Every person in South Africa must have access to accommodation that involves, at least, protection from the elements in sanitary conditions with access to basic services, such as toilets and running water'.<sup>78</sup>

<sup>75</sup> King (above n 69) 81–85.

<sup>76</sup> Michelman (above n 5).

<sup>77</sup> D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *South African Journal of Human Rights* 1, 11.

<sup>78</sup> D Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance' (2002) 119 *South African Law Journal* 484, 488.

Bilchitz argues that the Court's abjuration of a minimum core approach renders its model of review for reasonableness incoherent. The Constitution requires that the measures taken to realise the right to housing must be reasonable. But to be able to determine whether any measures are indeed reasonable, the obligation itself must have a determinate content: reasonableness must be judged in relation to the ends, purposes, or obligations the Constitution imposes. Without a pre-existing standard government programmes are required to aim at (ie, without the minimum core), review for reasonableness is empty.

Bilchitz's critique recognises that reasonableness is a standard which courts often apply in other areas. But in these other areas there is no analogue of the minimum core. Consider the law of negligence. In South Africa, a person is judged to have acted negligently if the reasonable person in her position would have acted differently.<sup>79</sup> It has always been recognised that what is reasonable 'depends on the particular circumstances of each case'.<sup>80</sup> Yet the absence of a core meaning of reasonableness in any given area of conduct does not render the application of the concept incoherent.

Thus, there is no 'minimum core right' on the part of a pedestrian or driver never to be involved in a collision. One caused without negligence will found no right to compensation, statutory or common law. The reasonableness of the colliding driver's conduct is assessed with regard to what the reasonable person would or should have done in all the circumstances – without any predetermined standard, or core, from which the reading is done.

There are of course important differences between judging delict and fundamental rights cases. I am making a narrow point in response to a conceptual objection: namely that the determinate application of a standard of reasonableness does not require the prior establishment of a standard analogous to the minimum core.

It is precisely this feature that gives the standard of reasonableness its flexibility. The flexibility and context-dependence of reasonableness is central to its capacity to serve its function in the context of socio-economic rights. It is by now well-established that socio-economic rights are intimately tied up with the founding constitutional value of dignity. And what is required to live a life of dignity differs widely in different contexts. The form of housing necessary to have a dignified life in a rural area may differ from what is required in town.

Finally, and importantly, the South African decisions show that in realising socio-economic rights judicial enforcement can achieve a great deal – but it cannot do everything; it cannot do it alone; and it does not always do it directly (by granting straightforward remedies to litigants seeking to enforce economic rights).

There is no doubt that the constitutionalisation of socio-economic rights and the resultant jurisprudence have had beneficial effects in the search for social justice. For example, *Grootboom* spurred government to pass detailed housing legislation, including a detailed Housing Code. This regulates efforts to address the chronic housing shortage, and attempts to do so in a way that conforms to the Bill of Rights. Criticism that the *Grootboom* order was ineffectual and charges that government did not comply with it<sup>81</sup> must thus be qualified. The Housing Code was undoubtedly triggered by *Grootboom*,

<sup>79</sup> *Kruger v Coetzee* 1966 (2) SA 428 (A) (South Africa) 430.

<sup>80</sup> *ibid.*

<sup>81</sup> See, for example, M Swart, 'Left Out in the Cold? Crafting Remedies for the Poorest of the Poor' (2005) 21 *South African Journal on Human Rights* 216.

and now constitutes the crucial legislative touchstone for the right of access to adequate housing.

It has also been argued that government did not adequately comply with the Court's order in *TAC*. In the days immediately following the court order, it became clear that political will to implement the order, especially in certain provincial health departments, was lacking.<sup>82</sup> Nonetheless, the order did result in thousands of doses of Nevirapine being administered to pregnant women and their newborn babies, thereby saving thousands of lives. The judgment and order also without question helped put an end to the government's espousal of AIDS denialist doctrines.<sup>83</sup>

And even in *Mazibuko*, a case where the applicants failed to secure any order at all, substantial benefits resulted. Dugard, one of the architects of the *Mazibuko* litigation, points out that the case had significant indirect benefits 'giving a voice to suffering, and highlighting structural problems' even though no direct remedy was obtained from the Court.<sup>84</sup> In some cases, socio-economic rights litigation functions best by facilitating the interaction between different branches of government. In cases such as *Mazibuko*, the primary value of socio-economic rights may be as a mechanism for the courts to hold other branches accountable and to extract justifications from them.<sup>85</sup>

These indirect effects are partly attributable to the high degree of legitimacy of socio-economic rights in South Africa. South Africans have to a large extent internalised the constitutional entitlement to the conditions for a dignified life, and vigorously assert those entitlements in everyday discourse. This is evident across the political spectrum. Our political discourse is ever more frequently framed in 'rights talk', whether it is the Freedom Front Plus claiming protection for Afrikaners as a cultural and linguistic community, or angry township- and settlement-dwellers protesting against slow service delivery. While their substantive political commitments differ widely, South Africans generally assume the legitimacy and supremacy of the Constitution and the Bill of Rights.<sup>86</sup>

As a result, the other branches of government also have compelling political incentives to move. The model of judicial review the Court has adopted may be argued to facilitate the role of the other branches and contributes to greater long-term effectiveness of enforcement.

<sup>82</sup> See Cameron (above n 25).

<sup>83</sup> Other decisions have had significant socio-economic impact. In *Khosa v Minister of Social Development and Others* (above n 72) the Constitutional Court declared void provisions of the Social Assistance Act which disqualified persons who are not South African citizens from a social grant. The Court held that the Constitution grants the right to social security to 'everyone' – and therefore that non-citizen permanent residents are also bearers of the right. Their exclusion was not a reasonable way to realise the right and was discriminatory and unfair and infringed the right to equality. The ruling put a significant amount of money into the pockets of some of the poorest and most vulnerable in the country.

In *Joseph and Others v City of Johannesburg and Others* (above n 56) the Court ruled that a local authority electricity supplier is not permitted to disconnect electricity to leased residential premises without giving the tenants, and not just the landlord (with whom the supplier has a contractual relationship), pre-termination notice and an opportunity to make representations. The Court held that the applicants received electricity as by public law right correlative to the constitutional and statutory duties of local government to provide basic municipal services. The applicants were accordingly entitled to procedural fairness before disconnection.

<sup>84</sup> J Dugard, 'Losers Can Be Winners', *Business Day* (20 October 2009).

<sup>85</sup> The fact that litigation is pending is itself a reason for government to scrutinise its programmes closely. It was clear in *Mazibuko* that the litigation triggered various revisions of the City's free basic water policy, effectively increasing the free water provided to persons like the applicants.

<sup>86</sup> Which is not to say that they agree about what the Constitution means. Disputes about the proper interpretation of its provisions endure.

Ray observes that 'other branches will be more willing to enforce court orders because they have a direct role in the interpretive process and therefore are more likely to view the outcome as legitimate'.<sup>87</sup>

By engaging the South African government in the interpretive process and by respecting its interpretations where appropriate, the Constitutional Court has begun to develop a relationship in which it expects government to take the lead in enforcing socio-economic rights. This is far more effective than establishing an antagonistic relationship in which government waits for specific court instruction and is unwilling to go beyond the bare minimum required by those specific orders.<sup>88</sup>

Ray's argument seems to find vindication in the interaction between the Court and other branches of government in *Olivia Road* and other cases.

For a related reason, the Constitutional Court's incremental approach to developing the reasonableness standard casuistically is justified. In early socioeconomic rights cases like *Grootboom*, it was not clear to state bodies what their obligations were. But there is evidence that the Court's socio-economic rights jurisprudence has begun to permeate government decision-making.<sup>89</sup>

The conduct of the City in *Mazibuko* demonstrates that at least some state bodies, when put on terms to justify their policies, understand that these must be assessed, updated, and possibly expanded if they are to be found reasonable.

Adopting a minimum core at the beginning of the Court's socio-economic rights journey could very possibly have precluded government's incremental acceptance. Given the material plight of so many in South Africa, a specified minimum core – assuming the epistemic difficulties in defining it could be overcome – would have led to findings of widespread violation or failure to comply by government. If constitutional violations are so widespread, the Court would not be able to provide practical remedies for each violation. The sense that these are rights that cannot be practically vindicated would thereby be exacerbated, with damaging consequences for wider public confidence in the Court and the Constitution.

In addition, findings of violations might be taken less seriously by government, since it started at the democratic transition with countless widespread violations.

Finally, the test of a violation could not be flexibly adapted for context, and so would create rigid standards that are ill-suited for evaluating policies that need to be highly adaptable and responsive to changed conditions (which follows from the obligation to 'progressively realise' socio-economic rights).

That is to the credit side of the Court's record. But we also know that judicial enforcement of socio-economic rights holds no magic. Where political will is lacking, government might drag its feet. An indispensable further concomitant is political engagement. This is demonstrated by *TAC*, where the Court issued a strong declarator. Yet it failed to produce immediate results. According to Achmat, the judgment was enforced only 'because of social mobilisation'.<sup>90</sup> This demonstrates the importance of a highly engaged

<sup>87</sup> Ray (above n 36) 173.

<sup>88</sup> *ibid.*

<sup>89</sup> See the detailed discussion of this effect in the area of housing policy in *ibid.*, 181.

<sup>90</sup> Z Achmat, 'Law, Politics, and Social Transformation' (2004) 32 *International Journal of Legal Information* 237, 240–41.

and active polity as an important complement to socio-economic rights litigation.<sup>91</sup> The TAC case was part of a broader strategy to pressure government to respond to the AIDS crisis as a whole; the litigation was 'simply the conclusion of a battle that had already been won outside the courts'.<sup>92</sup>

So courts cannot achieve social justice alone: far from it. Other branches of government and civil society activism are indispensable. Nor can courts become the sole site of democratic deliberation. Constitutional litigation is only one forum of democratic debate, and it cannot compensate for a lack of responsiveness or loss of faith in other deliberative bodies such as Parliament and the provincial legislatures.

Socio-economic rights litigation and judicial enforcement are part of the operative mechanism, but not all of it. Litigation is not the solution to all problems of social justice. It is vital for activists to remain engaged with our other deliberative bodies, and for those bodies to be held accountable through mechanisms in addition to constitutional litigation.

<sup>91</sup> M Heywood, 'Contempt or Compliance? The TAC Case After the Constitutional Court Judgment' (2003) 4 *Economic and Social Rights Review* 1.

<sup>92</sup> *ibid.*

# *Judicial Activism and the Indian Supreme Court: Lessons for Economic and Social Rights Adjudication*

ANASHRI PILLAY\*

## I. INTRODUCTION

THE INDIAN CONSTITUTION came into effect on 26 January 1950. For a large part of the following 64 years, constitutional lawyers at home and abroad saw the Supreme Court as a fiercely independent guardian of constitutional principles from governmental misuse. The Court developed a reputation as both a protector of individual rights and an engine for economic and social reform. To some extent, this received wisdom continues to exert a strong influence on contemporary perceptions of Indian constitutional law.<sup>1</sup> But, whilst recent scholarship acknowledges the achievements of the Court in some of its watershed rulings on economic and social equality, it also raises serious questions about the long-term impact of these judgments and about the Court's more recent treatment of matters of social justice.<sup>2</sup> This chapter

\* My thanks go to the participants in the ESRAN-UKI workshop, University of Leeds, 30 November 2012, for their comments on an earlier version of this chapter. The views expressed here and any errors in the text are my own.

<sup>1</sup> See, for example, V Sripathi, 'Human rights in India – fifty years after independence' (1997–98) 26 *Denver Journal of International Law and Policy* 93; B De Villiers, 'Directive principles of state policy and fundamental rights: the Indian experience' (1992) 8 *South African Journal on Human Rights* 29; S Meer, 'Litigating fundamental rights: rights litigation and social action litigation in India: a lesson for South Africa' (1993) 9 *South African Journal on Human Rights* 358; M Kirby, 'Judicial Activism' (1997) 23 *Commonwealth Law Bulletin* 1224. For some examples of later commentary, see G Subramanian, 'Contribution of Indian Judiciary to social justice principles underlying the Universal Declaration of Human Rights' (2008) 50 *Journal of the Indian Law Institute* 593; B Neuborne, 'The Supreme Court of India' (2003) 1 *International Journal of Constitutional Law* 476. These writers are not uncritical of the Supreme Court's record but they are overwhelmingly positive about its independence and creativity.

<sup>2</sup> See S Shankar and P Mehta, 'Courts and Socioeconomic rights in India' in V Gauri and D Brinks (eds), *Courting social justice: judicial enforcement of economic and social rights in the developing world* (Cambridge, CUP, 2008) 146–82; J Krishnan, 'Scholarly discourse, public perceptions and the cementing of norms: the case of the Indian Supreme Court and a plea for research' (2007) William Mitchell Legal Studies Research Paper Series Working Paper No 77: [www.ssrn.com](http://www.ssrn.com) (accessed 22 April 2009); 'Social policy advocacy and the role of the courts in India' (2003) 21 *American Asian Review* 91: [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=682326](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=682326) (accessed 14 May 2009); 'The rights of the new untouchables: a constitutional analysis of HIV jurisprudence in India' (2003) 25 *Human Rights Quarterly* 791; S Muralidhar, 'Economic, social and cultural rights: an Indian response to the justiciability debate' in Y Ghai and J Cottrell (eds), *Economic, social and cultural rights in*



examines the Indian Supreme Court's record in adjudicating socio-economic rights such as housing, health care and education. The main objectives here are to consider what this jurisprudence tells us about the Court's attitude to judicial activism and restraint; and to identify lessons about the constitutional role of courts in socio-economic rights adjudication more generally.

## II. DIRECTIVE PRINCIPLES OF STATE POLICY, LAND REFORM AND THE JUDICIARY

Drawing from the Irish Constitution, members of the Indian Constituent Assembly decided to set out the economic and social duties on the state as directive principles of state policy in Part 4 of the Constitution, separate from the fundamental rights detailed in Part 3. The directive principles were not intended to be enforceable by courts.<sup>3</sup> Instead, the drafters of the Constitution saw them as guiding principles for the central and State governments in the development of their policies. Whilst there was some disagreement about whether, and how, socio-economic interests should have been included in the Constitution, there was no ambiguity about the centrality of the goals the directive principles enumerated.<sup>4</sup> Chairperson of the Constitution drafting committee, BR Ambedkar, noted that the intention of the Constituent Assembly was that the principles be made the 'basis of all executive and legislative action'.<sup>5</sup>

As was the case in the South African constitutional drafting process, the architects of the Indian Constitution were very aware of the vast inequalities that existed in wealth, education, health care, access to land, etc in Indian society, and the urgent need for reforms in these areas was recognised in the text of [Chapter 4](#).<sup>6</sup> The fact that they did not feature as fundamental rights enforceable by courts predominantly signalled a concern with the relative institutional incapacity of judges to pronounce on these matters, not the relative lack of importance of the directive principles. This drafting choice was an indication that decisions about economic and social policy belonged in the legislative and executive domains. The directive principles set out a wide-ranging economic and social programme for the state.<sup>7</sup> By contrast, the South African drafters' recognition of the urgent need to realise a more equitable distribution of benefits such as health care and housing resulted in a set of carefully delineated, directly justiciable socio-economic rights.<sup>8</sup> Compared to the Indian Constitution's directive principles, the South African Constitution's socio-economic rights are a less detailed, more functional spelling out of the economic and social needs enforceable by courts – less a vision of the state's pro-

*practice: the role of judges in implementing economic, social and cultural rights* (London, Interights, 2004) 23; U Ramanathan, 'Demolition drive', *Economic and Political Weekly* (2 July 2005) 2908.

<sup>3</sup> Article 37. See also G Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford, OUP, 1966), ch 3 on the drafting history and background to the fundamental rights and Directive Principles of State Policy.

<sup>4</sup> De Villiers (above n 1) at 31–32.

<sup>5</sup> Shankar and Mehta (above n 2) at 148. See also O Reddy, *The Court and the Constitution of India: summits and shallows* (Oxford, OUP, 2008) at 75, quoting a 1954 comment by then Prime Minister Jawaharlal Nehru.

<sup>6</sup> De Villiers (above n 1) at 33.

<sup>7</sup> De Villiers (above n 1) at 32–33.

<sup>8</sup> The main South African socio-economic rights provisions (sections 26 and 27) contain internal limitations, leaving the state a significant amount of leeway in deciding how to implement the rights. This is discussed further in Edwin Cameron's [chapter \(sixteen\)](#) in this volume.

gramme for socio-economic reform and more a guide to courts about how to implement these rights through their judgments.

When the Indian Constitution was enacted, the political leaders who came to the fore were those who had fought in the struggle for India's independence whereas the judges were colonial appointees, drawn from the elite in Indian society.<sup>9</sup> As was the case when the 1996 South African Constitution was drafted, one of the concerns of the members of the Indian Constituent Assembly was that an unelected judicial body could thwart attempts at reform by using the fundamental rights sections to protect established economic interests – land interests, in particular.<sup>10</sup> The general view of politicians and judges at the time was that judicial review should be closely defined and very limited.<sup>11</sup> So, if in 1949 'maximum care was taken to prevent the courts in India from being more than auditors of legality',<sup>12</sup> what explains the expansion of judicial review the country has witnessed over the intervening decades?

The legislators' fears over judicial antagonism toward land reform, in particular, proved to be well-founded. From 1947, a number of States enacted legislation designed to promote agricultural reform.<sup>13</sup> Relying on their rights to property and equality, landholders used the courts to resist such reform.<sup>14</sup> Parliament reacted by passing a series of Amendments to the Constitution. Matters came to a head in the much discussed case of *Golaknath and Others v State of Punjab and Another*.<sup>15</sup> In this case, the petitioners questioned the validity of the First, Fourth and Seventeenth Amendment Acts.<sup>16</sup> A majority of the judges found that Parliament could not amend the Constitution in a manner which took away or abridged a fundamental right.<sup>17</sup> Realising, however, that the decision threatened the validity of countless governmental acts aimed at land reform which had been carried out in conformity with earlier Supreme Court decisions, and citing the need for judicial restraint when dealing with governmental acts affecting the economic and social affairs of the country, the Court opted for prospective overruling. This meant that the requirement that constitutional Amendments be consistent with the protection of fundamental rights applied only to future Amendments.<sup>18</sup>

The issue came to be reconsidered by the Supreme Court a few years later in the *Kesavananda* case.<sup>19</sup> The government had sought to regain its wide mandate to amend the Constitution and restrict property rights following the general election of 1971, in which the Congress Party secured more than two-thirds of the vote. To these ends,

<sup>9</sup> S Sathe, *Judicial activism in India: transgressing borders and enforcing limits* (Oxford, OUP, 2002) at 20–21.

<sup>10</sup> Sathe (above n 9) at 36.

<sup>11</sup> Sathe (above n 9) at 2–3, 6 and 20. See also N Robinson, 'Expanding judiciaries: India and the rise of the good governance court' (2009) 8(1) *Washington University Global Studies Law Review* 1, 4.

<sup>12</sup> Sathe (above n 9) at 3.

<sup>13</sup> The zamindars were 'tax farmers dating from the Moghul period who were entitled to collect fees from small landholders'. British legislation turned these tax collectors into 'de facto landlords'. See Neuborne (above n 1) at 487.

<sup>14</sup> Neuborne (above n 1) at 487, Sathe (above n 9) at 46–47 and Reddy (above n 5) at 44.

<sup>15</sup> *Golaknath and others v State of Punjab and another*, 1967 SCR (2) 762 (India): judis.nic.in/supremecourt/chejudis.asp (accessed 28 April 2009).

<sup>16</sup> *Golaknath* (above n 15) at 780–81.

<sup>17</sup> *Golaknath* (above n 15) at 793–805.

<sup>18</sup> *Golaknath* (above n 15) at 814. The court drew heavily on American and UK jurisprudence in deciding on this remedy.

<sup>19</sup> *Kesavananda Bharati Sripadagalvaru and Others v State of Kerala and Another*, AIR 1973 SC 1461 (India). For a more comprehensive discussion of the judgment, see S Krishnaswamy, *Democracy and constitutionalism in India: a study of the basic structure doctrine* (Oxford, OUP, 2009) at 26–42.

Parliament passed certain Amendments which were then challenged before the Court.<sup>20</sup> In this case, a majority of the judges overruled *Golaknath* but held that the legislative power to amend the Constitution was limited to the extent that an Amendment could not violate one of the basic features or the basic structure of the Constitution.<sup>21</sup> The judges did not follow *Golaknath* on the remedy either. Instead of opting for prospective overruling, they tested each of the previous Amendments against the newly set out doctrine and found them to be valid.<sup>22</sup>

Most importantly, what *Kesavananda* and subsequent cases have made clear is that it is for the court to determine whether an Amendment is valid, testing it against a judicially constructed and evolving basic structure doctrine. The courts have used the basic structure doctrine to overturn Amendments in only a handful of cases<sup>23</sup> but the *Kesavananda* decision is a constitutional landmark. The case is an indication that the court's view of its role as quite carefully circumscribed, along the lines of the United States Supreme Court, had changed dramatically. Furthermore, the context in which the basic structure doctrine was originally developed bolstered fears over the tendency of the judges to act as a conservative social force, insulating vested private property interests from a legislative programme of major economic and social reform.

Despite initial resistance,<sup>24</sup> the doctrine gained both academic approval and acceptance from government over the years.<sup>25</sup> This change in attitude may be attributed, at least in part, to the effects of the 1975–77 state of emergency. The emergency was precipitated by a legal challenge to Indira Gandhi's election to Parliament, based on allegations that she had practised election fraud.<sup>26</sup> The challenge succeeded before the Allahabad High Court and her election was set aside.<sup>27</sup> The Supreme Court granted Mrs Gandhi leave to appeal and stayed the execution of part of the High Court's order<sup>28</sup> but, before the Supreme Court decided on the merits of the case, the executive declared a presidential emergency.<sup>29</sup> The government then passed a series of constitutional Amendments barring the judiciary from enquiring into the declaration of emergency itself, any laws enacted during the emergency that conflicted with fundamental rights, the election of a Prime Minister and speaker of the lower house, and censorship laws.<sup>30</sup> Raj Narain, the opposition leader who had challenged Mrs Gandhi's election in the first place, challenged the validity of the Thirty-Ninth Amendment, as it had effectively put an end to his initial case.<sup>31</sup>

In *Indira Gandhi v Raj Narain* (known as the *Election case*),<sup>32</sup> a majority of the judges held that the Amendment was void on the basis that it abrogated the basic structure of the

<sup>20</sup> Sathe (above n 9) at 68–69; *Kesavananda* (above n 19) at para 2.

<sup>21</sup> See Krishnaswamy (above n 19) at 32; and Sathe (above n 9) at 78. A detailed discussion of the doctrine is beyond the scope of this chapter – see, generally, Krishnaswamy (above n 19).

<sup>22</sup> See the judgment of Jaganmohan Reddy J in *Kesavananda* (above n 19) at para 1227.

<sup>23</sup> Sathe (above n 9) at 87–89.

<sup>24</sup> For a description of governmental attempts to suppress the doctrine, see Sathe (above n 9) at 77–87.

<sup>25</sup> See Krishnaswamy (above n 19) at xx of the Introduction.

<sup>26</sup> Sathe (above n 9) at 73–74.

<sup>27</sup> Reddy (above n 5) at 66.

<sup>28</sup> *Indira Nehru Gandhi v Raj Narain and Another*, 1975 AIR 1590, at para 31 (India).

<sup>29</sup> See further Neuborne (above n 1) at 492–93.

<sup>30</sup> Neuborne (above n 1) at 493.

<sup>31</sup> Neuborne (above n 1) at 493; Sathe (above n 9) at 96; and Reddy (above n 5) at 56.

<sup>32</sup> *Indira Gandhi v Raj Narain*, AIR 1975 SC 2299.

Constitution.<sup>33</sup> Whilst the decision has been criticised for a lack of conceptual clarity,<sup>34</sup> its ‘cumulative effect’ was ‘to reassert *Kesavananda* in the teeth of the emergency’.<sup>35</sup> Commentators saw the basic structure doctrine in a new light – as a judicial tool through which government excesses could be curbed.<sup>36</sup> But the decision in the *Election case* was soon followed by *Additional District Magistrate, Jabalpur v SS Shukla*,<sup>37</sup> a case commentators agree was one of the chief low points in the Supreme Court’s history.<sup>38</sup> In this case, the Court held that the government’s wide powers of detention were beyond judicial review because the emergency laws prevented access to the courts,<sup>39</sup> despite the fact that there were widespread reports of various atrocities, including police torture.<sup>40</sup>

Even at this early point, the Supreme Court’s history of coming to the aid of the economically weak and socially marginalised was, at best, chequered. But the court’s post-emergency ‘doctrinal effervescence’<sup>41</sup> in interpreting the directive principles, in particular, may be attributed to two main factors. First, the political landscape had changed significantly. As noted by former Justice of the Supreme Court, O Chinnappa Reddy, ‘[t]he road signposts clearly changed from democracy to authoritarianism’.<sup>42</sup> The repressive measures government took against the Indian population created a gap in legitimacy which the Court attempted to fill by holding the government accountable for its constitutional promises of liberty and socio-economic reform. Sathe attributes the post-emergency judicial activism to the Court’s realisation that its reputation as a site of social privilege would not protect it against future attacks by a powerful political establishment’ – in short, the Court needed the people of India on its side.<sup>43</sup> A second, related point is that the Court needed to redeem itself after having so blatantly failed the people of India in *Jabalpur*.<sup>44</sup>

### III. PUBLIC INTEREST LITIGATION: MAKING DIRECTIVE PRINCIPLES OF STATE POLICY JUSTICIABLE

In the years following the end of the state of emergency in India, a small group of judges and lawyers<sup>45</sup> developed the model of public interest or social action litigation,<sup>46</sup> which has

<sup>33</sup> Sathe (above n 9) at 76; for a more detailed analysis of the reasoning of the various judges, see Krishnaswamy (above n 19) at 58–60.

<sup>34</sup> Krishnaswamy (above n 19) at 41; 59–60.

<sup>35</sup> Neuborne (above n 1) at 493. See also Sathe (above n 19) at 73.

<sup>36</sup> Sathe (above n 9) at 76–77.

<sup>37</sup> *Additional District Magistrate, Jabalpur v SS Shukla*, 1976 SCR 172 (India): judis.nic.in/supremecourt/chejudis.asp, (accessed 30 April 2009).

<sup>38</sup> Neuborne (above n 1) at 494; see also Krishnan (2007) (above n 2) at 13; Reddy (above n 5) at 68–69; Sathe (above n 9) at 104.

<sup>39</sup> *Jabalpur* (above n 37) at 477. But, see the dissenting opinion of Justice Khanna at 246–304.

<sup>40</sup> See Sathe (above n 9) at 104–5.

<sup>41</sup> Sathe (above n 9) at 104.

<sup>42</sup> Reddy (above n 5) at 65–66.

<sup>43</sup> Sathe (above n 9) at 107.

<sup>44</sup> See also B Rajagopal, ‘Pro-human rights but anti-poor? A critical evaluation of the Indian Supreme Court from a Social Movement Perspective’ (2007) 18 *Human Rights Review* 157, 159; and Krishnan (2007) (above n 2) at 13–14.

<sup>45</sup> M Galanter and J Krishnan, “Bread for the Poor”: access to justice and the rights of the needy in India’ (2004) 55 *Hastings Law Journal* 789, 795.

<sup>46</sup> See further F Munger, ‘Inquiry and Activism in Law and Society’ (2001) 35 *Law and Society Review* 7, 12; MC Mehta and *Another v Union of India and Others*, 1987 SCR (1) 819, 828–30 (India); and Sathe (above n 9) at 203.

become such a hallmark of the country's jurisprudence. The movement began as an attempt to make the courts more accessible to ordinary people by relaxing strict procedural rules.<sup>47</sup> But public interest litigation was not limited to new understandings of how cases could be brought to a court and who had a right to bring them. The movement also had a dramatic impact on the Supreme Court's approach to constitutional interpretation.

In a series of cases beginning with the 1978 decision of *Maneka Gandhi v Union of India and Another*,<sup>48</sup> the Court began to adopt an expansive approach to the interpretation of Article 21. The Article states: '[n]o person shall be deprived of his life or personal liberty except according to procedure established by law'. For some time, this was interpreted as a guarantee only that any interference with the right was carried out through the mechanism of law. Provided there was some piece of legislation in place, the Court would not enquire further into the soundness of that law and its effects on the individuals concerned.<sup>49</sup> But in *Maneka Gandhi*, the Court held that the procedure by which the Article 21 right is impinged on 'cannot be arbitrary, unfair or unreasonable'.<sup>50</sup> In addition, the majority stated that 'the expression "personal liberty" in Article 21 is of the widest amplitude'.<sup>51</sup> In the 1981 case *Francis Mullin*,<sup>52</sup> the Court, whilst acknowledging that economic considerations would play a role in determining the full content of the right to life, held that the right included the protection of human dignity and all that is attached to that: 'namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms'.<sup>53</sup> These cases were concerned with the protection of a fundamental and justiciable right but, before too long, the Court began to draw on directive principles of state policy in developing its right to life jurisprudence.

In *Paschim Banga Ket Mazdoor Samity v State of West Bengal*, for instance, the Court found that Article 21 encompasses a right to adequate medical facilities or health care.<sup>54</sup> It also interpreted other fundamental rights in light of directive principles – in *Mohini Jain v State of Kerala and Others*<sup>55</sup> the Court held that the right to equality before the law in Article 14 includes a right to education. In the subsequent case *Unnikrishnan v State of Andhra Pradesh* the Court clarified its findings in *Mohini Jain*, stating that Article 14 gave rise to a right to *primary* education.<sup>56</sup> Following the cases on education, in 1997

<sup>47</sup> See *Sunil Batra v Delhi Administration and Others*, 1979 SCR (1) 392 (India): judis.nic.in/supremecourt/chejudis.asp (accessed 3 May 2009); Neuborne (above n 1) at 501–2; MP Jain, 'The Supreme Court and fundamental rights' in SK Verma and Kusum (eds), *Fifty years of the Supreme Court of India: its grasp and reach* (Oxford, OUP, 2000) at 76–86; and AH Desai and S Muralidhar, 'Public interest litigation: potential and problems' in BN Kirpal et al (eds), *Supreme but not infallible: essays in honour of the Supreme Court of India* (Oxford, OUP, 2000). For a recent description and critique of the public interest phenomenon in India, see Sathe (above n 9), ch 6.

<sup>48</sup> *Maneka Gandhi v Union of India and Another*, (1978) 1 SCC 248 (India).

<sup>49</sup> See *AK Gopalan v State of Madras (Union of India: Intervener)*, 1950 SCR 88 (India): judis.nic.in/supremecourt/chejudis.asp (accessed 5 May 2009); and *Jabalpur* (above n 37), both cited in *Maneka Gandhi v Union of India and another* (1978) 1 SCC 248, 643–57 (India).

<sup>50</sup> *Maneka Gandhi* (above n 84) at 671.

<sup>51</sup> *Maneka Gandhi* (above n 84) at 670–71.

<sup>52</sup> *Francis Coralie Mullin v The Administrator, Union Territory of India and Others*, 1981 SCR (2) 516 (India): judis.nic.in/supremecourt/chejudis.asp (accessed 8 May 2009).

<sup>53</sup> *Francis Mullin* (above n 52) at 529.

<sup>54</sup> *Paschim Banga Ket Mazdoor Samity v State of West Bengal* (1996) 4 SCC 37 (India); *Consumer Education and Research Centre v India* (1995) 3 SCC 42 (India); *Bandhua Mukti Morcha v Union of India and others*, 1984 SCR (2) 67 (India).

<sup>55</sup> *Mohini Jain v State of Kerala and Others* (1992) 3 SCC 666 (India).

<sup>56</sup> *Unnikrishnan v State of Andhra Pradesh*, 1993 (1) SCC 645 (India). See also Jain (above n 47) at 32–33.

the Indian government proposed a constitutional Amendment recognising education for children under 14 as a fundamental right. This Amendment was passed in 2002 as Article 21A.<sup>57</sup>

One of the Court's earliest cases dealing with the role of the directive principles in constitutional interpretation is arguably also its most celebrated judgment. Some commentators see the decision in *Olga Tellis and Others v Bombay Municipal Corporation and Others*<sup>58</sup> as a recognition of enforceable right to shelter.<sup>59</sup> The finding in the case was, in fact, more limited. The petitioners were slum- and pavement-dwellers living in dreadful conditions in the then city of Bombay. The state evicted some of the residents but they returned to the original dwelling sites because they needed to be close to their places of work.<sup>60</sup> In a unanimous judgment, the Court drew on the right to work and the right to a livelihood, protected as directive principles of state policy,<sup>61</sup> reasoning that depriving a person of his or her livelihood would make life impossible to live and amounted therefore to a violation of Article 21.<sup>62</sup> However, there was no positive obligation on the state to provide work, an adequate means of livelihood or shelter. The state had to follow a fair, just and reasonable procedure before depriving a person of any of these rights.<sup>63</sup> In this case, the petitioners should have been given a hearing but this omission had been remedied during the proceedings before the Court. Given the deplorable conditions of the slums and pavement dwellings and the impact of the latter on pedestrians, the Court found that the decision to evict was reasonable.<sup>64</sup>

In his order for the Court, Chief Justice Chandrachud directed that none of the dwellers be removed until a month after the monsoon season.<sup>65</sup> Alternative accommodation had to be provided for those slum-dwellers with identity cards.<sup>66</sup> Furthermore, demolition of slums which had existed for more than 20 years and in which improvements had been made was not permissible unless the land was required for a public purpose.<sup>67</sup> Scott and Macklem are positive about these aspects of the order. In addition, they argue that the judges' emphasis on the need for existing government shelter and slum improvement programmes to be pursued in earnest were intended to get government to address systemic problems with provision of housing or, at least, to encourage a dialogue amongst political institutions about the issues involved.<sup>68</sup> The remedy handed down by the Court is not dissimilar to orders made in the context of evictions by the South African Constitutional Court, interpreting a directly justiciable right to adequate housing more

<sup>57</sup> J Kothari 'Social rights and the Indian Constitution' (2004) 2 *Law Social Justice and Global Development Journal*: [www2.warwick.ac.uk/fac/soc/law/elj/ugd/2004\\_2/kothari/](http://www2.warwick.ac.uk/fac/soc/law/elj/ugd/2004_2/kothari/) (accessed 10 April 2012).

<sup>58</sup> *Olga Tellis and Others v Bombay Municipal Corporation and Others*, 1985 SCR Supl (2) 51, 1986 AIR 180 (India); *Delhi Development Horticulture Employees' Union v Delhi Administration, Delhi and Others*, 1992 SCR (1) 565 (India).

<sup>59</sup> See Robinson (above n 11) at 43; Sathe (above n 9) at 118. Compare S Muralidhar, 'India: the expectations and challenges of judicial enforcement of social rights' in M Langford (ed), *Social rights jurisprudence: emerging trends in international and comparative law* (Cambridge, CUP, 2008) at 113.

<sup>60</sup> *Olga Tellis* (above n 58) at 63–64.

<sup>61</sup> *Olga Tellis* (above n 58) at 80.

<sup>62</sup> *Olga Tellis* (above n 58) at 79–80.

<sup>63</sup> *Olga Tellis* (above n 58) at 80–81; and 85.

<sup>64</sup> *Olga Tellis* (above n 58) at 86–87.

<sup>65</sup> *Olga Tellis* (above n 58) at 94.

<sup>66</sup> *Olga Tellis* (above n 58) at 96.

<sup>67</sup> *Olga Tellis* (above n 58) at 98.

<sup>68</sup> *ibid.*



than 20 years later,<sup>69</sup> an important difference being that, in the case of the pavement-dwellers in *Olga Tellis*, provision of alternative pitches was not made a condition of their eviction.<sup>70</sup> In sum, then, when it comes to protection of socio-economic rights, the impact of the *Olga Tellis* case is not as clear or as wide-ranging as has sometimes been assumed. But the tenor of the judgment and the order itself reflected a concern on the part of the Supreme Court with affording protection to the poor and the vulnerable.

This concern, and the changed attitude towards the directive principles of state policy, continued to find expression in Supreme Court decisions at the time. In *Sachidananda Pandey and Another v State of West Bengal and Others*,<sup>71</sup> for instance, the Court stated:

When the Court is called upon to give effect to the Directive Principle and the fundamental duty, the Court is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the policy-making authority. The least that the Court may do is to examine whether appropriate considerations are borne in mind and irrelevances excluded. In appropriate cases, the Court may go further, but how much further must depend on the circumstances of the case.<sup>72</sup>

The Court's use of the notion of a minimum standard for the protection of the right to life is also noteworthy. The idea that each socio-economic right has a minimum core, capable of immediate realisation, is one the South African Constitutional Court has steered away from because of concerns about courts lacking the information or expertise to delineate that core content. In *Bandhua Mukti Morcha v Union of India and Others*<sup>73</sup> the Indian Supreme Court, drawing on Articles 39(e) and (f), 41 and 42 of the directive principles, held that the right to life included certain minimum requirements to enable a person to live with human dignity:

protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief.<sup>74</sup>

The Court limited the duty imposed by these minimum requirements – the state could not take action that would deprive a person of the minimum essential level of the right.<sup>75</sup>

The cases discussed above show that in the Indian Supreme Court's post-emergency jurisprudence, the inclusive approach to the scope of the right to life did not often translate into positive obligations on the state. Sometimes, the cases simply affirmed requirements of a fair process set out in the relevant legislation.<sup>76</sup> As indicated by Neuborne,<sup>77</sup> the real 'ground-breaking event' of the movement was the Court's break with traditional

<sup>69</sup> The concern with the timing of evictions and the provision of suitable alternative accommodation is evident in cases like *Government of the RSA v Grootboom*, 2000 (11) BCLR 1169 (South Africa); and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*, 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC) (South Africa).

<sup>70</sup> *Olga Tellis* (above n 58) at 95–96.

<sup>71</sup> *Sachidananda Pandey and Another v State of West Bengal and Others*, 1987 SCR (2) 223 (India): judis.nic.in/supremecourt/chejudis.asp (accessed 11 May 2009).

<sup>72</sup> *Pandey* (above n 71) at 242.

<sup>73</sup> Above n 54.

<sup>74</sup> Above n 54 at 103.

<sup>75</sup> *ibid.* On minimum essential levels, see also *Paschim Banga Ket Mazdoor Samity v State of West Bengal*, (1996) 4 SCC 37, 47–48 (India).

<sup>76</sup> See Neuborne (above n 1) at 501.

<sup>77</sup> Neuborne (above n 1) at 501–3.



adversarial modes of litigation – the relaxation of the rules of standing, flexible pleading rules, new methods of fact-finding<sup>78</sup> and expanded remedial powers.<sup>79</sup> On the substance of the rights, the Court was certainly working with a transformed vision of constitutional interpretation and demonstrated a huge capacity for judicial creativity. But subsequent developments are a firm indication that the cases cannot be read as the beginning of judicial activism aimed at achieving greater social justice.

#### IV. LATER CASES: JUDICIAL ACTIVISM CURTAILED?

Mohan Gopal has recently argued that the courts' approach to social change has changed dramatically since 1991. He notes that 'the courts continue to be the last resort of the poor in their quest for social justice. But courts are not as forthcoming or responsive as they used to be in defending the causes of the poor'.<sup>80</sup> The courts – and the Supreme Court, in particular – appear to have embraced a model of social change that focuses on 'market-based economic growth' rather than the 'redistribution of wealth or breaking down social oligopolies as envisaged in the Constitution'.<sup>81</sup>

A number of cases decided by the Supreme Court in this period support Gopal's claim.<sup>82</sup> *Almitra H Patel and Another v Union of India and Others*<sup>83</sup> dealt with the implementation of statutory duties aimed at cleaning up the city of Delhi. In his judgment, Justice Kirpal made it clear that the slums were a major obstacle to the cleaning up of the city. Management of waste was much more difficult when people lived in slums which had no real means of getting rid of domestic waste and effluents.<sup>84</sup> He ordered that steps be taken to improve the sanitation in the slums. This, however, was only a temporary measure – the objective was to dispose of them as quickly as possible.<sup>85</sup> With a striking lack of concern for the plight of slum-dwellers and in a now infamous statement, Justice Kirpal noted that '[r]ewarding an encroacher on public land with a free alternative site is like giving a reward to a pickpocket'.<sup>86</sup>

The Court's decision in *Narmada Bachao Andolan v Union of India*<sup>87</sup> is, perhaps, the most profound example of how significantly the Court's approach to matters of social

<sup>78</sup> In *Bandhua Mukti Morcha* (above n 54) at 111–13, the Court appointed a socio-legal commission and treated its report as a prima facie statement of the facts. The Court explained its use of such commissions at some length in the judgment. See also *Common Cause v Union of India and Others*, 1996 (1) SCR 89, para 10 (India).

<sup>79</sup> See, for example, *Indian Council for Enviro-Legal Action and others v Union of India and Others*, 1996 (2) SCR 503, para 70 (India). The Court ordered the government to file quarterly progress reports on its implementation of the Court's directions.

<sup>80</sup> M Gopal, 'Supreme Court and the aam aadmi', *Frontline*, vol 30(8), 20 April 20–3 May 2013: [www.frontline.in/f3008/stories/20130503300801000.htm](http://www.frontline.in/f3008/stories/20130503300801000.htm) (accessed 6 May 2013).

<sup>81</sup> *ibid.*

<sup>82</sup> See, for instance, *Calcutta Electricity Supply Corporation (CESC) Ltd Etc v Subash Chandra Bose and Others*, 1991 SCR Supp (2) 267 (India).

<sup>83</sup> *Almitra H Patel and Another v Union of India and Others*, unreported judgment, decided on 15/02/2000: [www.judis.nic.in/supremecourt/chejudis.asp](http://www.judis.nic.in/supremecourt/chejudis.asp) (accessed 12 May 2009) AIR 2000 1256.

<sup>84</sup> *Almitra Patel* (above n 83) at 4.

<sup>85</sup> *Almitra Patel* (above n 83) at 7, para 6.

<sup>86</sup> *Almitra Patel* (above n 83) at 4. This may be contrasted with the South African Constitutional Court's approach in both *Grootboom* (above n 69) at para 2 and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005(5) SA 3 (CC) at paras 33 and 50.

<sup>87</sup> *Narmada Bachao Andolan v Union of India*, (2000) 10 SCC 664 (India): <http://judis.nic.in/supremecourt/imgs1.aspx?filename=17165> (accessed 12 May 2009).

justice had changed. The Court approved ‘the largest Court-sanctioned forced eviction in the world’<sup>88</sup> in the absence of compliance with statutory requirements for environmental clearance and adequate measures to secure the rehabilitation of the displaced peoples.<sup>89</sup> Justice Kirpal was highly critical of the seven-year delay on the part of Narmada Bachao Andolan, the organisation that filed the case in the Supreme Court, in bringing the case.

Adopting a position of extreme judicial deference, he stated:

Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy making process and the Courts are ill equipped to adjudicate on a policy decision so undertaken. The Court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people’s fundamental rights are not transgressed upon except to the extent permissible under the Constitution. Even then any challenge to such a policy decision must be before the execution of the project is undertaken. Any delay in the execution of the project means over run in costs and the decision to undertake a project, if challenged after its execution has commenced, should be thrown out at the very threshold . . . if the petitioner had the knowledge of such a decision and could have approached the Court at that time.<sup>90</sup>

In failing to address the petitioners’ concern that the construction of the dam at the planned height would result in a serious displacement problem that could not be managed by the government,<sup>91</sup> the Court effectively refused to acknowledge that the reason for the delay was that the organisation was engaged in an ongoing process with government to try to get a comprehensive assessment of the project.

At the same time, the Supreme Court’s treatment of the Right to Food litigation, begun in 2001, has been praised as a victory for India’s impoverished population. At the time of the case, India had a vast supply of grain stocks – so vast that they were in danger of being eaten by rats or thrown into the sea<sup>92</sup> – but India’s rural poor were starving.<sup>93</sup> Government was failing in its duty to implement the Famine Code.<sup>94</sup> The People’s Union for Civil Liberties (PUCL) brought the case in order to force government to take steps to ensure the effective implementation of the food distribution schemes created by the Code.<sup>95</sup> PUCL argued that failure to implement the schemes violated the right to life. The Court has handed down a series of interim orders<sup>96</sup> aimed at bringing immediate relief to the affected individuals. Perhaps the most important of these orders was that delivered on 28 November 2001,<sup>97</sup> in which the Court converted the schemes’ benefits into legal entitlements.<sup>98</sup>

<sup>88</sup> Rajagopal (above n 44) at 162.

<sup>89</sup> Muralidhar (above n 2) at 27–28; and Rajagopal (above n 44) at 162.

<sup>90</sup> *Narmada Bachao Andolan* (above n 87) at 70.

<sup>91</sup> See *Narmada Bachao Andolan* (above n 87) at 14–15.

<sup>92</sup> *People’s Union for Civil Liberties (PUCL) v Union of India* (2001) 5 SCALE 303; 7 SCALE 484 (India). See Supreme Court order of 20 August 2001 in N Saxena et al (eds), *Right to food*, 3rd edn (New Delhi, Socio-Legal Information Centre, 2008) at 27.

<sup>93</sup> N Saxena, ‘Food security and poverty in India’ in M Higgins, S Nautiyal and A Shah (eds), *Food security and judicial activism in India* (New Delhi, Human Rights Law Network, 2007) at 9–12.

<sup>94</sup> On the failings of the Public Distribution Schemes, see B Patnaik, ‘The poorest in the poorest states suffer the most’ in Higgins et al (above n 93) at 45.

<sup>95</sup> See Supreme Court order of 2 May 2003 in Saxena et al (above n 92) at 42–44.

<sup>96</sup> For a summary of these orders, see Saxena et al (above n 92) at 23–37.

<sup>97</sup> Saxena et al (above n 92) at 31–37.

<sup>98</sup> Saxena et al (above n 92) at 23.

Amongst other things, the Court ordered government to complete the identification of people who fell into the groups targeted for food distribution, issue cards to allow these people to collect the grain and distribute the grain to the relevant centres.<sup>99</sup> The order also provided for governmental inspections to ensure fair quality grain.<sup>100</sup> In this and subsequent orders, the court has set out requirements on reporting, accountability, monitoring, transparency and dissemination of court orders aimed at ensuring that its orders are followed.<sup>101</sup>

It would be inaccurate to argue that the case bucks what is otherwise a general trend on the part of the Supreme Court to abandon or sacrifice poor causes. When it comes to protecting vulnerable groups through judicial processes, the *Right to Food* case is not an isolated event. In a 2010 order, Justices Bhandari and Radhakrishnan of the Supreme Court ordered that the Government of Delhi respond to the extreme weather conditions by 'setting up more shelters and protecting homeless people from the cold'.<sup>102</sup> The Court allowed the Additional Solicitor General time to take instructions from the Delhi Administration. When the Court re-convened later in the day, the Additional Solicitor General was able to provide assurances that the affected people would be provided with shelter as a matter of priority and that arrangements would be made for this within the day. An undertaking to involve the Special Commissioner of the Supreme Court in the process was also given by the Delhi Administration.

There have been some promising developments in the context of the right to education. In *State of Bihar and Others v Project Uchcha Vidya, Sikshak Sangh and Others*<sup>103</sup> the Court ordered that a committee be appointed to investigate departures from the State of Bihar's policy concerning the establishment of 'Project Schools' aimed at improving its poor education record. The Court appointed a committee to investigate the matter. The Court's order included details as to the composition and functions of the committee, guidelines as to what would constitute irregularities in the implementation of the policy and an expectation that the State of Bihar would take remedial action if the committee found any irregularities.<sup>104</sup> The Court's approach to affirmative action in education is also instructive. In *Ashoka Thakur v Union of India*<sup>105</sup> the Court upheld the Ninety-Third Amendment to the Constitution, which allows for certain educational institutions to put in place special admissions rules in order to advance India's 'socially or educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes'.<sup>106</sup> The court held that people who are wealthier and better educated (the 'creamy layer')<sup>107</sup> should be excluded from the 27 per cent quota for 'Other Backward Classes'

<sup>99</sup> Saxena et al (above n 92) at 31–34; and Higgins et al (above n 93) at 24–37.

<sup>100</sup> Saxena et al (above n 92) at 32.

<sup>101</sup> See Higgins et al (above n 93) at 23–24.

<sup>102</sup> In *People's Union for Civil Liberties v Union of India*, IA No 94 in Writ Petition (Civil) 196 of 2001, order dated 20 January 2010 (India): [indialawyers.files.wordpress.com/2010/01/shelter-to-homeless.pdf](http://indialawyers.files.wordpress.com/2010/01/shelter-to-homeless.pdf) (accessed on 14 March 2012).

<sup>103</sup> *State of Bihar and Others v Project Uchcha Vidya, Sikshak Sangh and Others*, Appeal (civil) 6626–6675 of 2001 at 13, judgment delivered on 3 January 2006: [judis.nic.in/supremecourt/chejudis.asp](http://judis.nic.in/supremecourt/chejudis.asp) (accessed 10 April 2012).

<sup>104</sup> *Project Uchcha Vidya* (above n 103) at 21–22.

<sup>105</sup> *Ashoka Thakur v Union of India*, Writ petition (civil) no 265 of 2006, judgment delivered on 10 April 2008: [judis.nic.in/supremecourt/chejudis.asp](http://judis.nic.in/supremecourt/chejudis.asp) (accessed 10 April 2012).

<sup>106</sup> The challenge made in the case related to 'Other Backward Classes' rather than the Scheduled Castes or Tribes.

<sup>107</sup> *Ashoka Thakur* (above n 105) at para 144 (Balakrishnan CJ).

(OBC).<sup>108</sup> This step was needed to ensure that benefits reached those people living in desperate poverty. In addition, the inclusion of particular groups in the OBC category had to be reviewed every five years. Although the Court left the government a wide discretion in deciding which people fell within the ‘creamy layer’,<sup>109</sup> its approach was certainly less deferential than in some of the cases referred to above.

Responses to the HIV/AIDS pandemic have also given rise to some interesting legal developments with respect to the right to health care. The Punjab Voluntary Health Centre (PVHC) petitioned the Supreme Court to order the government to provide free anti-retroviral drugs (ARV’s) to HIV-positive people in 2003.<sup>110</sup> On 5 August 2008, the Court approved a list of commitments government had made regarding the HIV treatment and support. The Human Rights Law Network, which represented PVHC in the case, was worried that government’s undertakings did not include provision of second-line treatment that is, a different combination of ARV’s for those people who became resistant to their original medication or who were experiencing serious side-effects from this medication.<sup>111</sup> Sankalp Rehabilitation Trust, represented by Lawyers’ Collective, has used public interest litigation as a means to monitor implementation of the National ARV Rollout Programme.<sup>112</sup> At the Court’s request, the Trust filed the directions it sought before the Court in 2008. Following this, a series of meetings in which various stakeholders participated took place. The National AIDS Control Organisation (NACO); people living with HIV/AIDS; and representatives of the office of the Solicitor-General of India and Lawyers’ Collective agreed on 14 points which were then endorsed by the Court. In a separate application, Sankalp Rehabilitation Trust objected to NACO guidelines restricting the provision of second-line ARV treatment to four categories of people, on the basis that they were discriminatory and violated the right to life. The Court indicated that the guidelines would not withstand judicial scrutiny and, following further discussion, NACO agreed to widen access to second-line treatment to all people who needed it.<sup>113</sup> Both cases are pending final judgment before the Supreme Court and there remain significant problems with implementation<sup>114</sup> of the orders issued thus far. However, the litigation has played a role in securing changes to government policy and in widening access to HIV/AIDS treatment.

<sup>108</sup> *Ashoka Thakur* (above n 105) at paras 150–52 (Balakrishnan CJ); para 139 (Pasayat and Thakur JJ); para 1 (Raveendran J) and paras 30 and 52 (Bhandari J). For an analysis of the judgment, see PB Mehta, ‘It’s a landmark’, *The Indian Express* (11 April 2008): [www.indianexpress.com/news/its-a-landmark/295263/1](http://www.indianexpress.com/news/its-a-landmark/295263/1) (accessed 10 April 2012).

<sup>109</sup> *Ashoka Thakur* (above n 105) at para 154 (Balakrishnan CJ); and para 54 (Bhandari J).

<sup>110</sup> *Voluntary Health Association of Punjab v Union of India*, Writ petition 311 of 2003 – see Shankar and Mehta (above n 2) at 161; and V Hiremath, ‘HIV/AIDS and the Law’ in M Desai and K Mahabal (eds), *Health Care Case Law in India: A Reader* (Mumbai, Centre for Enquiry into Health and Allied Themes (CEHAT) and India Centre for Human Rights and Law (ICHRL), 2007) at 58–59: [www.cehat.org/humanrights/caselaws.pdf](http://www.cehat.org/humanrights/caselaws.pdf) (accessed 12 April 2012).

<sup>111</sup> M Sharma, ‘These commitments make provisions for people living with HIV/AIDS (PLHA) in India’, *The Indian Post*, 9 August 2008: [www.theindiapost.com/health/these-commitments-make-provisions-for-people-living-with-hiv-aids-plha-in-india](http://www.theindiapost.com/health/these-commitments-make-provisions-for-people-living-with-hiv-aids-plha-in-india) (accessed 12 April 2012).

<sup>112</sup> *Sankalp Rehabilitation Trust v Union of India*, Writ petition 512 of 1999. See [www.lawyerscollective.org/hiv-and-law/current-cases.html](http://www.lawyerscollective.org/hiv-and-law/current-cases.html) (accessed 12 April 2012).

<sup>113</sup> *ibid.*

<sup>114</sup> Shankar and Mehta (above n 2) at 161.

## V. LESSONS FROM THE INDIAN EXPERIENCE OF ECONOMIC AND SOCIAL RIGHTS ADJUDICATION

The discussion above – the fact that judgments like that in the *Right to Food* case sit alongside those in cases like *Narmada Bachao Andolan* – cautions against drawing categorical conclusions about the Supreme Court's current approach to pro-poor causes. An examination of the cases leaves one with a sense of radical inconsistency. But there are some common themes and concerns to be identified.

First, the cases highlight a lesson that has become trite in economic and social rights litigation – in this area, judicial action is most effective when it is used as part of a broader, well-organised civil society struggle to ensure increased access to housing, health care, education etc.<sup>115</sup> The *Right to Food* litigation has led the Court to define government's obligations more clearly (the emphasis on the quality of the grain is an example here) and to put in place supervisory measures. But PUCL has gone back to court repeatedly due to delays in compliance and non-compliance with the orders. Struggles for the right to food pre-date the case by many years.<sup>116</sup> But the 2001 drought, which affected a number of States and left large numbers of people facing starvation in the knowledge that government was allowing excess grain stocks to rot, galvanised disparate groups and individuals into a 'full-fledged Right to Food campaign'.<sup>117</sup> The national press took up the issue with some fervour and Justice BN Kirpal handed down successive early orders favouring the applicants.<sup>118</sup> As Colin Gonsalves, founding director of the Human Rights Law Network, the organisation which has been driving the *Right to Food* litigation in India, notes '[t]he Court's four initial orders lifted our morale and spurred a national campaign on the right to food that was subterranean and waiting for something to set off a chain reaction'.<sup>119</sup>

Similar lessons about the value of a multi-pronged strategy for the implementation of social and economic rights are apparent from the work of the Treatment Action Campaign in broadening access to anti-retroviral drugs in South Africa. This organisation has used a combination of protest, lobbying, litigation and the threat of litigation to further its aims.<sup>120</sup> Even where the South African Constitutional Court has found government action regarding evictions or water provision to be reasonable, the process of litigation and aspects of the Court's orders requiring further dialogue, together with sustained pressure from civil society, have played a role in getting government to reconsider and alter its policies.<sup>121</sup>

<sup>115</sup> See Galanter and Krishnan (above n 45) at 796.

<sup>116</sup> C Gonsalves, 'The politics of hunger, the privatisation of food and the PDS' in *Right to food*, volume 1 (New Delhi, Human Rights Law Network, 2004) 310, 310.

<sup>117</sup> J Kothari, 'The right to water: a constitutional perspective' Paper prepared for the International Environmental Law Research Centre (IELRC) workshop, 'Water, Law and the Commons', New Delhi, 8–10 December 2006: [www.ielrc.org/activities/workshop\\_0612/content/d0607.pdf](http://www.ielrc.org/activities/workshop_0612/content/d0607.pdf) (accessed 27 October 2011).

<sup>118</sup> C Gonsalves, 'Introduction to the third edition', *Right to Food*, 3rd edn (New Delhi, Human Rights Law Network, 2008) at 19.

<sup>119</sup> Gonsalves (above n 116) at 310.

<sup>120</sup> M Heywood, 'South Africa's Treatment Action Campaign: combining law and social mobilization to realize the right to health' (2009) 1 *Journal of Human Rights Practice* 14.

<sup>121</sup> See J Dugard, 'Urban Basic Services: Rights, Reality and Resistance' in M Langford, B Cousins, J Dugard and T Madlingozi (eds), *Symbols or Substance: The Role and Impact of Socio-Economic Rights Strategies in South Africa* (Cambridge, CUP, 2013) 28–31; and A Pillay, 'Towards effective social and economic rights adjudication: the role of meaningful engagement' (2012) 10 *International Journal of Constitutional Law* 732, 749–51.

Secondly, successes in litigating for increased access to socio-economic goods in India have often been achieved against a background of pre-existing governmental commitments and in the context of limited resource implications. The *Right to Food* case is, again, an example here. Whilst the Court has accepted the idea that the right to life contains a right to food,<sup>122</sup> the actual court remedies focus on the provision of grain to people who are without food in a national context of abundant food stocks. Furthermore, the litigation is primarily aimed at forcing government to fulfil its pre-existing guarantees set out in the Famine Code.

In a recent explanation for what others have referred to as the Court's ad hoc approach<sup>123</sup> to economic and social rights adjudication, Madhav Khosla puts forward a 'conditional social rights thesis'. According to Khosla, the Court will hand down a remedy when the state has breached a commitment to take action (to provide shelter to slum-dwellers, for instance) or when the state has been negligent (for example, by not maintaining a hospital it chose to build).<sup>124</sup> Where prior state action allows the Court to conclude that a duty exists and has been breached, it has a generous remedial capacity – illustrated by the use of the continuing mandamus used in the *Right to Food* litigation and by creative remedies such as compensation.<sup>125</sup>

However, Khosla's thesis does not, and arguably was not intended to provide a complete explanation for the lack of coherence in the Court's approach to socio-economic rights. Even in cases where governmental obligations arise from a specific assurance or undertaking, the nature of the remedies granted by the Court varies quite radically. In the *Right to Food* case, for example, the Court went so far as to identify the number of calories a mid-day meal provided to schoolchildren should contain.<sup>126</sup> In cases like *Olga Tellis*, the Court chose simply to make governmental commitments an order of court. Furthermore, the conditional social rights approach does not account for the Court's treatment of the *Narmada Bachao Andolan* case. In that case, the Court ordered that eviction go ahead despite glaring omissions in the state's legal undertakings. And, as Khosla himself notes, quite apart from the outcome on the merits of a case, judicial acknowledgement of a 'right to health care' or a 'right to food' may have strong expressive value giving rise to changes in social meanings over time. By continuously reminding government of its duties, the Court may influence state behaviour.<sup>127</sup> When 'the justiciable nature of social rights is passionately expressed'<sup>128</sup> in one case but homeless

<sup>122</sup> See the order of 2 May 2003 in *Saxena et al* (above n 92) at 45.

<sup>123</sup> Muralidhar (above n 2) at 31. Rajagopal refers to a 'serious measure of substantive ad hocism' in the judgments of the Indian Supreme Court (above n 44) at 160.

<sup>124</sup> M Khosla, 'Making social rights conditional: lessons from India' (2010) 8 *International Journal of Constitutional Law* 739.

<sup>125</sup> See further, Khosla (above n 124) at 759–60.

<sup>126</sup> See P Ahluwalia, 'The implementation of the right to food at the national level: a critical examination of the Indian campaign on the right to food as an effective operationalization of the Article 11 of ICESCR', Center for Human Rights and Global Justice Working Paper Economic, Social and Cultural Rights Series Number 8, 2004 (NYU School of Law) at 45–46: [www.chrgj.org/publications/docs/wp/Ahluwalia%20Implementation%20of%20the%20Right%20to%20Food.pdf](http://www.chrgj.org/publications/docs/wp/Ahluwalia%20Implementation%20of%20the%20Right%20to%20Food.pdf) (accessed 9 April 2012).

<sup>127</sup> See Khosla (above n 124) at 761–63. There are several examples of the state modifying its behaviour in response to pending litigation. See, for instance, the *Paschim Banga Ket Mazdoor Samity v State of West Bengal* case (above n 75) discussed by Khosla (above n 124) at 755. The state's 2003 policy on increasing provision of free anti-retroviral drugs was a response to threatened litigation as well as national and international pressure – see Shankar and Mehta (above n 2) at 161.

<sup>128</sup> Khosla (above n 124) at 743.



people who have settled in land illegally are likened to 'pickpockets' in another, the expressive value of the recognition of socio-economic rights is diminished.

Thirdly, success in socio-economic litigation seems to depend on there being no competing corporate interests involved in the case. Gopal points out that there is now a widespread political consensus that social change is to be achieved through 'market-based economic growth' and judicial decisions tend to fall into line with this consensus.<sup>129</sup> Economic liberalisation and a governmental emphasis on sustainable development have had a significant impact on judicial decisions – land reform, housing and tribal rights take a back seat to these concerns in an increasing number of cases.<sup>130</sup>

Fourthly, there are a number of institutional factors which militate against both consistency and effectiveness of socio-economic rights litigation. Non-governmental organisations working on access to socio-economic goods like food, health care and education are quick to affirm the benefits of a clear judicial precedent recognising access to these goods and imposing corresponding duties on government, when these occur.<sup>131</sup> But, they have to weigh those benefits against the high cost of litigation and the massive delays in getting a judgment at all.<sup>132</sup> Studies convincingly demonstrate that non-governmental organisations are slow to turn to the courts<sup>133</sup> because of these institutional challenges. The courts are overloaded but this is due to the fact that there are insufficient judges and courts rather than being attributable to an unusually litigious society.<sup>134</sup>

The structure of the Indian Supreme Court has added to the difficulties in socio-economic rights enforcement. There are currently 30 justices on the bench, including the Chief Justice. Due to relaxed standing rules and a liberal approach to admissibility of cases, a large number of judgments are now being handed down by two-judge Division Benches: '[a]s the pool of precedent has grown, courts and counsel have been unable to keep pace with such growth, which inevitably leads to inconsistency in the law'.<sup>135</sup> The uncertainty with which individuals and organisations are forced to approach litigation is highlighted by comments made in the context of the *Right to Food* case. Colin Gonsalves recalls advising a colleague not to talk about the case 'because the chances were high of the Supreme Court rejecting the petition . . . [w]hat we didn't factor into our calculation was Justice BN Kirpal who unexpectedly took up the case with gusto'.<sup>136</sup> The Supreme Court's judgment in the *Novartis* case,<sup>137</sup> handed down in 1 April 2013 is also interesting in this context. Novartis sought patent protection for Glivec, a drug used to treat certain

<sup>129</sup> Above n 80. But see the discussion of the *Novartis* case (n 137 below).

<sup>130</sup> Rajagopal (above n 44) at 161 and 166. See also Justice Krishna Iyer in *The Hindu* (17 December 2002) as cited by Justice Suresh (retired), 'Socio-economic rights and the Supreme Court' at para 15: [escrib-net.org/user\\_doc/suresh\\_article.doc](http://escrib-net.org/user_doc/suresh_article.doc) (accessed 28 July 2010); and P Bhushan, 'Sacrificing human rights and environmental rights at the altar of development', talk presented at George Washington University Law School on 13 March 2009, at 7–8, text: [www.judicialreforms.org/files/sacrificing\\_human\\_rights\\_and\\_environmental\\_rights\\_at\\_the\\_altar\\_of\\_development.pdf](http://www.judicialreforms.org/files/sacrificing_human_rights_and_environmental_rights_at_the_altar_of_development.pdf) (accessed 15 May 2009).

<sup>131</sup> See Krishnan, *Human Rights Quarterly* (above n 2) at 791–819; see also Shankar and Mehta (above n 2) at 178.

<sup>132</sup> Krishnan, *American Asian Review* (above n 2) at 93.

<sup>133</sup> Shankar and Mehta (above n 2) at 176–79; and Krishnan, *American Asian Review* (above n 2) at 100.

<sup>134</sup> Krishnan, *American Asian Review* (above n 2) at 100 and 123. Gopal (above n 80) points out that 'India has amongst the lowest number of new cases filed each year per thousand population'.

<sup>135</sup> A Sengupta, 'Inconsistent decisions', cover story, *Frontline*, vol 30(8), 20 April–3 May: [www.frontline.in/cover-story/inconsistent-decisions/article4613887.ece](http://www.frontline.in/cover-story/inconsistent-decisions/article4613887.ece) (accessed 6 May 2013).

<sup>136</sup> Gonsalves (above n 116) at 310.

<sup>137</sup> *Novartis AG v Union of India and others; NATCO Pharma Ltd; MS Cancer Patients Aid Association v Union of India and others* (India): [supremecourtindia.nic.in/outtoday/patent.pdf](http://supremecourtindia.nic.in/outtoday/patent.pdf) (accessed on 6 May 2013).



forms of cancer. This protection would have prevented Glivec from being sold in generic form at a much lower cost, effectively denying masses of people in India, and in the rest of the developing world, access to the drug. Justices Alam and Desai ruled against Novartis on the basis that Glivec did not qualify as an invention under the Patents Act of 1970. In reaching this decision, the judges focused on patent laws and the chemical nature of the drug but they were also mindful of the need to ensure access to life-saving drugs for impoverished people.<sup>138</sup> Venkatesan makes two points about the case: first, a bigger Bench may have been able to hand down a clearer judgment on some of the complex matters in the case. Secondly, and more significantly for the purposes of this chapter, ‘had the matter been heard by another two-judge Bench not so committed to the public interest there was the risk of the decision going in favour of Novartis’.<sup>139</sup> The case was listed before two other Benches before and it was only because of two recusals that Justices Alam and Desai ended up hearing the matter.<sup>140</sup> This underlines the problems with lack of certainty and consistency arising from institutional features of the Court.

From the perspective of legal authority and certainty, having an apex court which sits as a single Bench – such as the US Supreme Court or South African Constitutional Court – has clear advantages. In fact, in the Indian Supreme Court’s early history it did, for the most part, sit as a single Bench. But, in the context of the volume of litigation in India today, two-judge Division Benches would appear to be inevitable.<sup>141</sup> Arghya Sengupta has suggested various mechanisms for alleviating the effects of this situation – such as treating decisions by these Benches as decisive in the particular case but only persuasive for future cases.<sup>142</sup> A full discussion of alternatives is beyond the scope of this chapter. It suffices to note that the volume of two-judge Divisional Benches is a factor leading to inconsistency and a problem that has yet to be addressed. In addition, although appointment of new Chief Justices through a strict principle of seniority removes elements of arbitrariness from the process, the result is that succeeding Chief Justices are already close to retirement and tend to serve for only a few years. Again, this does not facilitate legal continuity and Chief Justices do not have enough time to instigate major reforms.<sup>143</sup> Similarly, since the 1980s only candidates older than 55 years have been appointed to the Bench. Given the fact that judges retire at 65, a judge can only serve on the Supreme Court for 10 years; most, in fact, serve for less.<sup>144</sup> Diversity of the Bench is also an issue – geographical diversity has been emphasised but, when it comes to gender, religion and caste, the level of homogeneity in the Supreme Court is worrying.<sup>145</sup> Gopal argues that the judicial selection process needs to take into account the record of candidates in upholding constitutional ideals:

This is not to be mistaken for a call for commitment to any political cause or to a static or to a fixed constitutional philosophy. Certainly, however, it must include, at the very minimum, demonstrated faith in justice (social, economic and political), equality, liberty, dignity and the

<sup>138</sup> *Novartis* (above n 137) at para 4.

<sup>139</sup> V Venkatesan, ‘Lessons from Novartis case’, cover story, *Frontline*, vol 30 (8), 20 April–3 May 2013: [www.frontline.in/cover-story/lessons-from-novartis-case/article4619579.ece](http://www.frontline.in/cover-story/lessons-from-novartis-case/article4619579.ece) (accessed 6 May 2013).

<sup>140</sup> *ibid.*

<sup>141</sup> Sengupta (above n 135).

<sup>142</sup> Sengupta (above n 135).

<sup>143</sup> Neuborne (above n 1) at 483; see also Shankar and Mehta (above n 2) at 149.

<sup>144</sup> Abhinav Chandrachud, ‘Age, seniority, diversity’, cover story, *Frontline*, vol 30 (8), 20 April–3 May 2013: [www.frontline.in/cover-story/age-seniority-diversity/article4613881.ece](http://www.frontline.in/cover-story/age-seniority-diversity/article4613881.ece) (accessed 6 May 2013).

<sup>145</sup> *ibid.* See also Gopal (above n 80).

ideas of democracy, socialism and secularism as laid down in the Constitution – as evidenced in the life and habits of judicial candidates.<sup>146</sup>

Judicial selection is also a highly contentious issue in South Africa. Similar arguments have been made about the need for the transformation of the still largely white male judiciary there. Moreover, the idea that judges should show themselves to be committed to the founding values of the South African Constitution has also been raised with respect to the judicial selection process.<sup>147</sup>

A fifth and related point concerns the approach of Supreme Court judges to judicial activism. The judgment handed down by Justice Katju in the 2007 case *Aravali Golf Club and Another*,<sup>148</sup> in which he criticised the Delhi High Court for straying ‘into the executive domain or in matters of policy’ were the catalyst for a heated debate about the role of the judiciary. Katju J indicated that the courts should not be handing down orders on a long list of matters including ‘supply of drinking water in schools, number of free beds in hospitals on public land, use and misuse of ambulances . . . begging in public . . . the legality of constructions in Delhi, identifying the buildings to be demolished’.<sup>149</sup> According to Katju J, these were all matters exclusively within the competence of the legislature or executive. All that judges were entitled to do was to enforce pre-existing laws in these areas.<sup>150</sup>

Judicial reactions to Katju J’s comments in *Aravali* suggest that the Indian Supreme Court has only recently begun to seriously grapple with the development of a principled approach to judicial activism and restraint. The then Chief Justice of India, KG Balakrishnan, reacted to the judgment by announcing the appointment of a larger Bench of Supreme Court judges to frame guidelines for PIL cases. This move also arose from the fact that, in the wake of the *Aravali* judgment, a number of High Court judges had expressed confusion over their mandates and a reluctance to hear certain PIL cases.<sup>151</sup> These guidelines were not issued under Chief Justice Balakrishnan and current Chief Justice SH Kapadia has not yet fulfilled the undertaking made by his predecessor.

## VI. CONCLUSION

When it comes to the adjudication of socio-economic rights, the Indian Supreme Court’s jurisprudence offers much food for thought. Despite the fact that the Constitution does not contain justiciable socio-economic rights, the Court’s long history of drawing upon the directive principles in interpreting fundamental rights means that it has more experience in this area than any other apex court. Criticisms of particular judgments or of the

<sup>146</sup> Gopal (above n 80).

<sup>147</sup> See Pierre de Vos, ‘Time to talk about the appropriate political role of the JSC’: constitutionally speaking, [co.za/time-to-talk-about-the-appropriate-political-role-of-the-jsc/](http://co.za/time-to-talk-about-the-appropriate-political-role-of-the-jsc/) (accessed 6 May 2013). Compare ‘Isak Smuts quits JSC over transformation disagreement’, South African Press Association: [www.timeslive.co.za/local/2013/04/12/isak-smuts-quits-jsc-over-transformation-disagreement](http://www.timeslive.co.za/local/2013/04/12/isak-smuts-quits-jsc-over-transformation-disagreement) (accessed 6 May 2013).

<sup>148</sup> *Divisional Manager, Aravali Golf Club and Another v Chander Hass and Another*, 2007 (12) SCR 1084, 2008(1) SCC 683 (India): [judis.nic.in/supremecourt/helddis1.aspx](http://judis.nic.in/supremecourt/helddis1.aspx) (accessed 6 October 2011).

<sup>149</sup> *Aravali Golf Club* (above n 148) at para 26.

<sup>150</sup> *ibid.*

<sup>151</sup> See ‘Supreme Court plans guidelines on PILs’, [Indian express.com](http://indianexpress.com), 15 December 2007: [www.indianexpress.com/news/supreme-court-plans-guidelines-on-pils/250497/](http://www.indianexpress.com/news/supreme-court-plans-guidelines-on-pils/250497/) (accessed 4 October 2011); and Samanwaya Rautray, ‘Activism-wary judges wash hands of case’, *The Telegraph*, 12 December 2007: 208.223.222.112/1071212/asp/frontpage/story\_8658989.asp (accessed 4 October 2011).

Court's general approach to adjudication in this area do not detract from the Court's influence in debates about the justiciability of socio-economic matters. At the very least, the rhetoric in cases like *Olga Tellis* and *Paschim Banga* added strength to the now commonplace understanding that rights are indivisible and interdependent. These, and other post-emergency cases, highlighted the importance of socio-economic rights and provided a focal point for scholarship about the justiciability of these rights. The Indian Supreme Court has made an important contribution to the burgeoning acceptance that courts have a role to play in implementing rights to health care, housing, food, water etc.

At the same time, the Indian experience underscores the limitations within which courts operate when deciding on matters with complex social, political and economic repercussions. For organisations working in this area, it is clear that litigation is most effective when used as part of multi-pronged strategy to secure greater access to socio-economic goods to those in need. This conclusion is reinforced by the experience in several other jurisdictions. India's more original contribution to the debate about how courts should approach socio-economic rights relates to judicial activism and restraint. In the Court's early (post-emergency) approach to the directive principles, the judges were keen to come to the aid of the poor and vulnerable: evident in the tenor and outcome of their decisions, though perhaps not always in the remedies they handed down. As noted above, the vocabulary of these cases has played an important role in altering perceptions about socio-economic rights. But commentators have pointed to inconsistencies in reasoning, a lack of principle and a failure to fully consider the impact of judgments even in these early cases.<sup>152</sup> These criticisms apply even more strongly to later cases. Whilst it is unreasonable and not always advantageous to require that the judges on an apex court speak with one voice on all matters, Indian Supreme Court socio-economic rights jurisprudence strongly suggests that the judges need to be more self-consciously consistent in their general approach to judicial activism and restraint. Principles guiding the Court's approach and a re-consideration of how decisions by two-judge Division Benches are treated should both be made matters of higher priority.

<sup>152</sup> J Cottrell and Y Ghai, 'The role of the courts in the protection of economic, social and cultural rights' in Ghai and Cottrell (above n 2) at 74–77.

## *American Exceptionalism over Social Rights*

JEFF KING\*

### I. INTRODUCTION

THE UNITED STATES is exceptional among similarly wealthy nations for its low public commitment to securing adequate socio-economic assistance to its citizens. For instance, it compares particularly badly with respect to both relative poverty and income inequality, as noted throughout the studies amassed in Richard Wilkinson and Kate Pickett's *The Spirit Level*.<sup>1</sup> Differences in social attitudes are perhaps more striking. In his study on inequality, John Hills presents results from a survey that asked respondents to indicate why people live in need, by choosing between 'laziness and lack of willpower' or because 'society treats them unfairly'.<sup>2</sup> In the United States, 61 per cent of respondents chose the former, whereas a similar answer was produced, within 15 comparable countries in Europe, in numbers that averaged at 18 per cent of respondents. The fact is illuminated by studies concerning anti-poverty rhetoric in America, where inflammatory terms 'welfare queens' have often had all but candidly racist overtones towards African Americans.<sup>3</sup> It followed an old tradition of stigmatising single-mothers and members of racial minorities (as part of the 'undeserving' or 'unworthy' poor).<sup>4</sup> Even the Aid for Families with Dependent Children (AFDC) programme (1935–96), which was itself eviscerated by welfare reform in 1996,<sup>5</sup> has been described as

\* The author would like to thank Caroline Daly and Alma Mozetic for outstanding research assistance, and Murray Wesson for helpful editorial advice and feedback. This essay is a substantially condensed version of an article forthcoming in the *International Journal of Constitutional Law*, entitled 'Two Ironies about American Exceptionalism over Social Rights.'

<sup>1</sup> R Wilkinson and K Pickett, *The Spirit Level: Why Equality is Better for Everyone* (London, Penguin, 2010). See also OECD Income distribution and Inequality database: <http://stats.oecd.org/Index.aspx?DataSetCode=IDD> (accessed 12 August 2012).

<sup>2</sup> J Hills, *Inequality and the State* (Oxford, OUP, 2004) 69.

<sup>3</sup> BL Ross II and T Smith, 'Minimum Responsiveness and the Political Exclusion of the Poor' (2009) 72 *L and Contemporary Problems* 207.

<sup>4</sup> On which, see JF Handler, 'The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context' (1987) 16 *New York University Review of Law & Social Change* 457, 459; G Mink, 'Welfare Reform in Historical Perspective' (1994) 26 *Connecticut Law Review* 879, 880. See also E Bussiere, *(Dis)entitling the Poor: The Warren Court, Welfare Rights, and the American Political Tradition* (University Park, Pennsylvania State University Press, 1997) 73–76, 83.

<sup>5</sup> See further below (text to nn 116–27).

‘ungenerous by international standards and uneven in [its] coverage across the states and population groups at risk’.<sup>6</sup> Disability rights, even, do not always compare well.<sup>7</sup>

Despite this political and cultural attitude, there are two distinct ironies in the American brand of exceptionalism about social rights. The first is that American judges often enforce obligations to provide social welfare services in a manner that is strikingly interventionist by comparison with most other wealthy states. And the second is that although these strong remedies are effective for claimants, the impact on bureaucracies more generally has drawn highly ambivalent reactions among informed commentators who want a robust welfare state (see Section III). These are the two ironies about American exceptionalism over social rights. American judges have been more assertive than many suppose, and in doing so have delivered less than most dared to hope for, and may even have inadvertently caused regression in some instances. I consider some explanations for these two ironies and reflect on what lessons the American experience holds out for other countries. I suggest there that the two ironies may well be explained by America’s tendency to treat rights as trumps that are resistant to limitations, and by the demand-pressures for legal relief generated by America’s also comparative underfunding of public services.

## II. THE FIRST IRONY: EXCEPTIONAL JUDICIAL ENFORCEMENT OF CERTAIN SOCIAL WELFARE RIGHTS

Surprisingly perhaps, one can find many examples of US courts intruding more deeply, and more often, into welfare bureaucracies than do the courts of possibly any other country in the world. This is evident upon examination of the situation under the federal constitution and state constitutions.<sup>8</sup>

### A. The US Constitution

There is a standard story about the rise and fall of a welfare rights vision of the US Constitution. From judicial obstructionism during *Lochner* Era, to a progressive brand of deference afterwards,<sup>9</sup> the Warren Court (1953–69) was established and it became famous around the world for its protection of marginalised groups in a range of famous cases.<sup>10</sup> Throughout the 1960s, poverty law courses grew exponentially in US law schools, and leading constitutionalists like Charles Reich and Frank Michelman developed theoretically sophisticated arguments for why the Fourteenth Amendment was

<sup>6</sup> RS Melnick, *Between the Lines: Interpreting Welfare Rights* (Washington DC, Brookings Institution Press, 1994) 65.

<sup>7</sup> JL Erkulwater, *Disability Rights and the American Social Safety Net* (Ithaca NY, Cornell University Press, 2006) 235–39.

<sup>8</sup> Due to considerations of length, I have omitted a discussion of the litigation of positive rights under federal statutes in the area of welfare, special educational needs, and disability rights.

<sup>9</sup> B Ackerman, *We the People: Foundations* (Cambridge MA, Belknap Press, 1993); CR Sunstein, ‘*Lochner*’s Legacy’ (1987) 7 *Columbia Law Review* 873.

<sup>10</sup> See eg *Brown v Board of Education*, 347 US 483 (1954) (United States); *Baker v Carr*, 369 US 186 (1962); *Miranda v Arizona*, 384 US 436 (1966) (United States).

best read as protecting welfare rights.<sup>11</sup> In landmark Supreme Court cases, claimants argued: that wealth or poverty was a suspect ground of discrimination under the equal protection clause;<sup>12</sup> that certain welfare interests should be recognised as implied rights under the (substantive) due process clause, the interference with or denial of which attracts stricter judicial scrutiny;<sup>13</sup> and that once welfare or other benefits were granted, they became akin to a 'new property', the public deprivation of which must respect procedural due process (a view accepted for welfare benefits determinations by the Supreme Court in the judicial high-water mark for this brief period of hope).<sup>14</sup>

On the conventional view, the high hopes were dashed by the shift from the Warren Court to the Burger Court in 1969. In *Dandridge v Williams* (1970)<sup>15</sup> the Supreme Court announced that 'the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court'.<sup>16</sup> In *San Antonio School District v Rodriguez* (1973)<sup>17</sup> the Court held that '[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution . . . It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws'.<sup>18</sup> It was in *DeShaney v Winnebago County* (1989),<sup>19</sup> a case where social services failed to protect a child at obvious lethal risk, where the Court put the point at its starkest:

[t]he [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security . . . [and] . . . its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.<sup>20</sup>

Stephen Gardbaum has argued convincingly that claims about American exceptionalism in constitutional rights litigation are often exaggerated, including with respect to social rights.<sup>21</sup> Even so, it is right to acknowledge that there are subtle ways in which the US courts are more hostile to social rights claims than are their foreign cousins. One difference is that non-American apex courts often reject watertight distinctions between socio-economic and civil and political rights, leave open the question of whether social rights could be justiciable nationally, and are less wary of extending positive human rights obligations into general social services duties.<sup>22</sup> In its *Z v United Kingdom* (2001)

<sup>11</sup> CA Reich, 'The New Property' (1964) 73 *Yale Law Journal* 733; FI Michelman, 'The Supreme Court, 1968 Term – Foreword: On Protecting the Poor Through the Fourteenth Amendment' (1969) 83 *Harvard Law Review* 7.

<sup>12</sup> *Shapiro v Thompson*, 394 US 618 (1969) (United States).

<sup>13</sup> *Lindsey v Normet*, 405 US 56 (1971) (United States).

<sup>14</sup> *Goldberg v Kelly*, 397 US 254 (1970) (United States). See further below for analysis.

<sup>15</sup> *Dandridge v Williams*, 397 US 471 (1970) (United States). Though *Goldberg* and *Dandridge* are sometimes contrasted as the high and low of the period, *Dandridge* was handed down less than three weeks after *Goldberg*.

<sup>16</sup> *ibid.*, 487.

<sup>17</sup> *San Antonio School District v Rodriguez*, 411 US 1 (1973) (United States).

<sup>18</sup> *ibid.*, 33, 35.

<sup>19</sup> *DeShaney v Winnebago County Department of Social Services*, 489 US 189 (1989) (United States).

<sup>20</sup> *ibid.*, 195.

<sup>21</sup> S Gardbaum, 'The Myth and Reality of American Constitutional Exceptionalism' (2008) 107 *Michigan Law Review* 391, 446–53.

<sup>22</sup> *Airey v Ireland* (1979–80) 2 EHRR 305, [22] (ECtHR) ('there is no watertight division separating [social and economic rights] from the field covered by the Convention'); see further, AR Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford, Hart Publishing, 2004). See also *Irwin Toy Ltd v Quebec* [1989] 1 SCR 927, 1003–4 (Canada); *R v Secretary of State for the Home Department, ex parte Limbuela* [2005] UKHL 66, [920] (United Kingdom).

decision, for instance, the European Court of Human Rights (ECtHR) held, in contrast to the approach of the US Supreme Court in *De Shaney*, that a failure by social services to protect children could amount to ‘cruel, inhuman and degrading treatment’, and did in that case.<sup>23</sup> These subtly different judicial attitudes, which have allowed piecemeal inflation of social rights-friendly readings of classical civil rights, are part of an expanding European and Commonwealth political acceptance of social rights as human rights, and potentially constitutional rights if the right political steps are taken. The fruit of that tree is found in the adoption of social rights in the EU Charter of Fundamental Rights, the evolution of social rights under the German Constitutional Court’s jurisprudence, and even serious parliamentary consideration of a bill of social rights in the United Kingdom.<sup>24</sup> Even so, and in fairness to Gardbaum, it would be quixotic to consider a door left open to be a truly remarkable difference at this point. This is all the more so when one contemplates the other side of the federal constitutional story in the United States.

That other side is that there are at least four areas in which the US courts have given considerably more protection under the US Constitution to welfare interests than have the courts in any other comparable country. The first is in protecting substantive equality in education. In *Brown v Board of Education* (1954),<sup>25</sup> the Court ruled unanimously that racially segregated educational facilities are inherently unequal. Thereafter, the federal courts went to astonishing lengths in order to make desegregation orders and superintend their implementation. Perhaps the most (in)famous was *Swann v Charlotte-Mecklenburg Board of Education* (1971), which found that there would be ‘a presumption against schools that are substantially disproportionate in their racial composition’ and an affirmative state obligation to ‘eliminate from the public schools all vestiges of state-imposed segregation’.<sup>26</sup> The remedial dimension became even more famous: that busing students to schools outside their residential zone was an appropriate desegregation remedy. *Swann* had a very considerable impact in other cases. In *Adams v Richardson* (1972), for example, a DC District Court accepted that the NAACP’s<sup>27</sup> Legal Defense Fund’s class action case represented ‘students, citizens, and taxpayers’ of 17 different States.<sup>28</sup> Having shown that *Swann*’s presumption had not been rebutted, Judge Pratt ordered the US Department of Health, Education and Welfare to commence the termination of funding to 127 school districts where the proportionality principle set out in *Swann* had been violated. The Department thereafter commenced busing plans in these cities.<sup>29</sup> In perhaps the most remarkable decision, *Missouri v Jenkins* (1995), the

(Lord Brown: ‘[I]t seems to me generally unhelpful to attempt to analyse obligations . . . as negative or positive, and the state’s conduct as active or passive. Time and again these are shown to be false dichotomies’.) See also the *Hartz IV* Decision, BVerfG, 1 BvL 1/09 (9 February 2010) (Germany) (affirming the duty to provide for the minimum existential needs (*Existenzminimum*) of all citizens (and now also for asylum applicants: *Asylum Seekers Benefits Law* case, 1 BvL 10/10, 1 BvL 2/11 (18 July 2012) (Germany)).

<sup>23</sup> *Z v United Kingdom* (2001) 34 EHRR 97 (ECtHR).

<sup>24</sup> For background see J King, *Judging Social Rights* (Cambridge, CUP, 2012) ch 1, and 279–81.

<sup>25</sup> *Brown v Board of Education of Topeka*, 347 US 483 (1954) (United States).

<sup>26</sup> *Swann v Charlotte-Mecklenburg Board of Education*, 402 US 1 (1971) (United States).

<sup>27</sup> National Association for the Advancement of Colored People.

<sup>28</sup> *Adams v Richardson*, 351 F Supp 636 (DC Cir 1972) (United States).

<sup>29</sup> *Adams v Richardson*, 356 F Supp 92 (DC Cir 1973) (United States). See further, J Dunn, *Complex Justice: The Case of Missouri v Jenkins* (Chapel Hill NC, University of North Carolina Press, 2008) 28–29. Ultimately, the Supreme Court curtailed the use of busing as a remedy to situations of de jure discrimination: *Milliken v Bradley*, 418 US 717 (1974) (United States).



Supreme Court approved the judicial imposition (by a lower court judge) of tax increases to support over US\$2 billion in school improvements that were required to desegregate Kansas City schools.<sup>30</sup> This remedy cuts further across contemporary notions of the separation of powers than any I have yet come across in another social rights case. Furthermore, key educational equity cases were not all about desegregation. In *Lau v Nicholls* (1974), the Supreme Court found that the failure to provide second-language learning services to a large group of Chinese students who had limited English language proficiency amounted to discrimination on grounds of national origin.<sup>31</sup> The Court found that the school districts must 'take affirmative steps to rectify the language deficiency in order to open its instructional program to these students'.<sup>32</sup> The case led to important new administrative guidelines known as the 'Lau remedies'.<sup>33</sup> These forays were as much about education as they were about discrimination, and they played a crucial role in enabling the subsequent explosion in educational finance litigation.<sup>34</sup>

The second noteworthy form of protection was the Court's jurisprudence on administrative due process in benefits decision-making. In *Goldberg v Kelly* (1970),<sup>35</sup> the Supreme Court ruled that a person is entitled to a hearing before a decision to terminate his or her welfare benefits under the AFDC programme. The first issue was whether deciding entitlements under AFDC engaged due process at all. Here the Court was unequivocal:

Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a "privilege" and not a "right"'.<sup>36</sup>

Such constitutional protection has not been recognised in Canada, which omitted 'property' (and thus 'new property') from its Charter, and provides no freestanding right to a fair trial (though it does give substantive and procedural protections to rights to life, liberty and security of the person).<sup>37</sup> Similarly, English judges have been slow to conclude that welfare benefits decision-making determines 'civil rights and obligations' under the European Convention on Human Rights (ECHR),<sup>38</sup> and the Strasbourg Court (ECtHR) has crept along slowly, braving strong dissenting judgments about 'civil rights' not intended to mean 'public law rights'.<sup>39</sup>

The second main issue was what process was due, and here the Supreme Court went well beyond what the ECtHR has been willing to hold.<sup>40</sup> The Court in *Goldberg* remarked

<sup>30</sup> *Missouri v Jenkins*, 515 US 70 (1995) (United States). A definitive study of it is found in Dunn, *Complex Justice* (n 29 above).

<sup>31</sup> *Lau v Nicholls*, 414 US 563 (1974) (United States).

<sup>32</sup> *ibid*, 568.

<sup>33</sup> See the discussion below in section III.

<sup>34</sup> Melnick, *Between the Lines* (n 6 above) 144.

<sup>35</sup> *Goldberg v Kelly*, 397 US 254 (1970) (United States).

<sup>36</sup> *ibid*, 262–63 [citations and footnotes omitted].

<sup>37</sup> See RJ Sharpe and K Roach, *The Charter of Rights and Freedoms*, 4th edn (Toronto, Irwin Law, 2009) ch 13.

<sup>38</sup> *Ali v Birmingham City Council* [2010] 2 AC 39 (United Kingdom) (statutory rights to benefits-in-kind (as opposed to cash benefits) are not 'civil rights' within the meaning of the Convention).

<sup>39</sup> *Feldbrugge v The Netherlands* (1986) 8 EHRR 425 (ECtHR) (contributory benefits engage 'civil rights'; cf dissent at [23]); *Salesi v Italy* (1998) 26 EHRR 187 (ECtHR) (non-contributory benefits included; cf strong dissent).

<sup>40</sup> See eg the cautious approach in *Bryan v United Kingdom* (1995) 21 EHRR 342 (ECtHR); *Tsfayo v United Kingdom* (2009) 48 EHRR 18 (ECtHR).

that due process did not entitle the recipient of benefits to a full judicial trial. However, it did find only six years later that *Goldberg's* requirements 'closely approximat[ed] a judicial trial'.<sup>41</sup> It is not hard to see why. The case secured constitutional entitlements, prior to termination of benefits, to (a) timely and adequate notice, (b) an oral hearing (c) the effective opportunity to confront and cross-examine any adverse witnesses; (d) representation by counsel (though not state-funded counsel), (e) an impartial decision-maker (who could nonetheless be another department official who did not participate in the initial decision), and (f) a decision based solely on evidence and legal rules adduced at the hearing.<sup>42</sup> It is true that in *Mathews v Eldridge* (1976), the Supreme Court refused to apply the *Goldberg* requirements to Disability Insurance determinations, finding that welfare benefits were based on financial need and were fundamental, whereas DI benefits (which are contributory, insurance-based) were not necessarily either.<sup>43</sup> Nonetheless, *Goldberg* has remained both good law<sup>44</sup> and an important landmark in administrative justice, and was comparatively quite interventionist.

The third notable area of social protection under the US bill of rights concerns rights to state-funded medical assistance for prisoners. In the recent case of *Brown v Plata* (2011), the Supreme Court held, reaffirming the precedent set in *Estelle v Gamble* (1976),<sup>45</sup> that '[a] prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society'.<sup>46</sup> While the substantive entitlement is not radical comparatively, the American courts' willingness to order serious institutional change is.<sup>47</sup> In *Brown v Plata*, the Court ruled unconstitutional a decades-long practice of extreme overcrowding in California's prisons. The seriousness of the Court's remedy is evident in the tone and content of Scalia J's acerbic dissent: '[t]oday the Court affirms what is perhaps the most radical injunction issued by a court in our Nation's history: an order requiring California to release the staggering number of 46,000 convicted criminals'.<sup>48</sup>

The final and most important aspect of the 'other side' of the federal constitutional story is the remedial innovation of the structural injunction.<sup>49</sup> This remedy, roughly speaking, is one in which a judge issues an order to a defendant institution to undertake comprehensive structural reforms. The judge retains supervisory jurisdiction, requiring the defendant to report back to the court on success in satisfying judicially imposed benchmarks and timelines. The judge typically orders the appointment of an official

<sup>41</sup> *Mathews v Eldridge*, 424 US 319, 333 (1976) (United States).

<sup>42</sup> *ibid*, 266–71.

<sup>43</sup> *Mathews v Eldridge*, 424 US 319, 340–42 (1976) (United States).

<sup>44</sup> The welfare reform measures in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 have diminished *Goldberg's* reach. See CR Farina, 'On Misusing "Revolution" and "Reform": Procedural Due Process and the New Welfare Act' (1998) 50 *Administrative Law Review* 591.

<sup>45</sup> *Estelle v Gamble*, 429 US 97 (1976) (United States).

<sup>46</sup> *Brown (Governor of California) v Plata*, 131 S Ct 1910, 1928 (2011) (United States).

<sup>47</sup> M Feeley and E Rubin, *Judicial Policy Making in the Modern State: How the Courts Reformed America's Prisons* (Cambridge, CUP, 2000).

<sup>48</sup> *Brown v Plata* (n 46 above) 1950. This claim oversimplifies the Court's actual remedy. It gave two years to reduce overcrowding in other ways, and emphasised that the lower court may extend the deadline if necessary.

<sup>49</sup> See A Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harvard Law Review* 1281; C Diver 'The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions' (1979) 65 *Virginia Law Review* 43; J Resnik, 'Managerial Judges' (1982) 96 *Harvard Law Review* 374. For a more recent discussion, C Sabel and W Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard Law Review* 1015.

(normally, a ‘special master’) who has technical proficiency in the area at issue.<sup>50</sup> The role of the master is to help devise and later supervise implementation of the decree, and to report to the court. They often supervise negotiations between claimants and defendants, steering them to an agreed remedial plan that the judge subsequently turns into a binding public law obligation by means of a ‘consent decree’, the violation of which will constitute contempt of court. Many such decrees remain in effect for several years, in some cases decades (on which, see section III below), and they are supplemented from time to time by court orders that may be aimed at aspects of administration or the legislature itself. The cases are episodic, better described as ‘litigations’ rather than court cases. Foreign courts other than those of India have largely been quite cautious about using these remedies; they are miles away from anything remotely as interventionist as the practice in America.<sup>51</sup> While structural injunctions grew out of the institutional reform litigation following *Brown*, they have been used subsequently in hundreds (or more) cases, many concerned with education, disability, and mental health.

## B. State Constitutions

The most remarkable instances of social rights litigation are for the most part found under State constitutions, on which there is a sizeable literature.<sup>52</sup> Most state constitutions have some provisions related to welfare or education, and many have been litigated. Helen Hershkoff’s notable work in this regard shows how in adjudication under such constitutions, the counter-majoritarian difficulty is blunted by the fact that state judges are often elected and State constitutions more easily amended,<sup>53</sup> and that judges have met institutional competence concerns through creative adaptation of the public law litigation model.<sup>54</sup> One can have a better appreciation of the range of social rights provisions and adjudication by considering a few areas.

### (i) Constitutional Rights to Welfare and Housing

According to William C Rava, 23 State constitutions ‘recognize that someone or something in the individual states will provide for those in need’.<sup>55</sup> Some provisions fall short of a duty; they indicate a power, or that an institution ‘shall be established’. However, four States have an affirmative duty: Alabama, Kansas, New York and Oklahoma.<sup>56</sup> The clause in New York’s constitution, introduced by amendment in a constitutional convention in 1938, provides a good example:

<sup>50</sup> See DL Horowitz, ‘Decreeing Organizational Change: Judicial Supervision of Public Institutions’ (1983) *Duke Law Journal* 1265, 1272–76, 1297–302.

<sup>51</sup> See King, *Judging Social Rights* (n 24 above) 271–75 for a comparative overview.

<sup>52</sup> For a small sample, see B Neuborne, ‘Foreword: State Constitutions and the Evolution of Positive Rights’ (1989) 20 *Rutgers Law Journal* 881; WC Rava, ‘State Constitutional Protections for the Poor’ (1998) 71 *Temple Law Review* 543; E Pascal, ‘Welfare Rights in State Constitutions’ (2008) 39 *Rutgers Law Journal* 863.

<sup>53</sup> H Hershkoff, ‘Positive Rights and State Constitutions: The Limits of Federal Rationality Review’ (1999) 112 *Harvard Law Review* 1131, 1157–66. See also H Hershkoff, ‘“Just Words”: Common Law and the Enforcement of State Constitutional Social and Economic Rights’ (2010) 62 *Stanford Law Review* 1521.

<sup>54</sup> Hershkoff, ‘Positive Rights and State Constitutions’ (above n 53) 1175 ff.

<sup>55</sup> Rava, ‘State Constitutional Protections for the Poor’ (above n 52) 551. The constitutional provisions that I cite or quote in this section are reproduced in Appendix A to Rava’s article.

<sup>56</sup> *ibid.*

*New York Constitution, art XVII, 1*

The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such a manner and by such means, as the legislature may from time to time determine.

A similar article is provided in the Kansas constitution:

*Kansas Constitution, art VII, 4*

The respective counties of the state shall provide, as may be prescribed by law, for those inhabitants who, by reason of age, infirmity, or other misfortune, may have claims upon the aid of society. The state may participate financially in such aid and supervise and control the administration thereof.

In *Tucker v Toia* (1977), the New York Court of Appeals struck down an attempt by the State legislature to deny eligibility for federally subsidised AFDC benefits to those young claimants who had not obtained a disposition (legal order) against a relative who would ordinarily be responsible for care. However, in the subsequent case of *Bernstein v Toia* (1977), the Court of Appeals rejected a claim that a State policy of a fixed, flat rate for shelter allowances that allowed no consideration of special circumstances was unconstitutional.<sup>57</sup> Nevertheless, there remains a range of other welfare cases under New York law where statutes or policies have been held to violate article XVII of the NY Constitution.<sup>58</sup>

There appear to be no explicit State constitutional rights to housing as such. However, some courts have construed welfare provisions as securing shelter in some circumstances.<sup>59</sup> New York again leads the way. In *Callahan v Carey* (1979), the judge found that the City was constitutionally bound to provide a homeless shelter to certain men, and entered a consent decree to that effect.<sup>60</sup> In *Eldredge v Koch* (1983), the court accepted as 'scarcely warranting discussion' that such a right required the City to provide shelters to similarly situated women.<sup>61</sup> In *McCain v Koch* (1986), the Court found that New York City's practice of shuttling the families between local welfare offices, requiring them to sleep in such offices, or in squalid hotels, could be a violation, inter alia, of the constitutional right to emergency shelter secured by article XVII.<sup>62</sup> The reported case was a decision on a motion for a preliminary injunction granted by the Supreme Court, Appellate Division, which on this issue concluded as follows:

<sup>57</sup> *Bernstein v Toia*, 373 NE 2d 238 (NY 1977) (United States).

<sup>58</sup> A sample of such cases would include *Hudson v Sipprell*, 76 Misc 2d 684, 351 NYS 2d 915 (1974) (Sup Ct) (United States) (Commissioner of social services had no power under the social services law to promulgate regulation requiring withholding public assistance from welfare cheats until amount withheld equalled the amount wrongfully obtained); *Young v Toia*, 93 Misc 2d 1005, 403 NYS 2d 390 (1977), mod on other grounds 66 AD 2d 377, 413 NYS 2d 530 (4th Dept, App Div) (United States) (form of extremely low-paid workfare declared unconstitutional as involving both a form of involuntary servitude and failure to provide public relief to needy); and the more recent *Aliessa v Novello*, 96 NY 2d 418 (2001) (Ct App) (United States) (Social Services Law violates letter and spirit of Art XVII § 1 by imposing, on legal aliens, overly burdensome eligibility conditions having nothing to do with need and depriving them of entire category of otherwise available basic necessity benefits).

<sup>59</sup> N Rotunno, 'Note: State Constitutional Social Welfare Provisions and the Right to Housing' (1996) 1 *Hofstra L & Policy Symposium* 111.

<sup>60</sup> *Callahan v Carey*, *New York Law Journal*, 11 December 1979, at 10 (Sup Ct NY, December 5 1979), aff'd 118 AD 2d 1054 (1st Dept, App Div 1986) (United States).

<sup>61</sup> *Eldredge v Koch*, 98 AD 2d 675 (1st Dept, App Div 1983) (United States).

<sup>62</sup> *McCain v Koch*, 502 NYS 2d 720 (App Div 1986), rev'd on other grounds, 511 NE 2d 62 (Ct App 1987) (United States).

It is also likely that plaintiffs will succeed on their claim that NY Constitution article XVII obligates defendants to provide emergency shelter for homeless families. New York State has made the care of its needy residents a constitutional mandate . . . The framers of the State Constitution intended article XVII to require the State to take positive steps to assist the needy, rather than to voice aspiration towards ideal social policy.<sup>63</sup>

In related follow-up cases regarding the right to emergency shelter, the New York courts found there to be clear obligations in non-constitutional New York law to furnish emergency shelter immediately. When a trial court judge found that consent decrees against social services had been continuously left unfulfilled and that the practices continued, she found the officials in contempt, ordered money damages against the City, and actually ordered four senior administrative officials (including the Deputy First Mayor) to spend a night sleeping in the offices with the applicants for emergency housing! That last remedy was not upheld on appeal, but the highest court in the State did find that such a remedy would in fact be available ‘for particularly egregious conduct or wilful inaction’.<sup>64</sup>

### (ii) *Constitutional Rights to Adequate Education*

The extraordinary standout rights— and consistent with America’s oft declared commitment to equality of opportunity — are State constitutional rights or duties in respect of education.<sup>65</sup> Nearly every state constitution has an education clause that requires the state to establish a public school system, and many of these also indicate that some level of adequacy is constitutionally required.<sup>66</sup> One bout of litigation in particular illustrates the form, content and judicial interpretation of such provisions.

The *Campaign for Fiscal Equity v New York* litigation commenced when the Campaign for Fiscal Equity (CFE) filed a claim in 1993, and ended in 2006 when the NY Court of Appeals directed the State to spend an additional US\$1.93 billion per year to remedy educational inadequacy in New York City’s public school system. The education clause of the NY Constitution is not unequivocal about a constitutional right to adequate education: ‘The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated’. (Article XI, 1, NY Constitution). However, in the first major case, *CFE I* (1995), the New York Court of Appeals found that the educational article ‘requires the State to offer all children the opportunity of a sound basic education’, consisting of ‘the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury’, as well as ‘minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn’, ‘minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks’, and ‘minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained

<sup>63</sup> *ibid*, 730 [citations omitted].

<sup>64</sup> The story is told in *McCain v Dinkins*, 84 NY 2d 216, 230–31 (Ct App 1994) (United States).

<sup>65</sup> Hershkoff, ‘Positive Rights and State Constitutions’ (above n 53) 1186–91 (explaining the divergence between state welfare and educational adequacy guarantees).

<sup>66</sup> P Enrich, ‘Leaving Equality Behind: New Directions in School Finance Reform’ (1995) 48 *Vanderbilt Law Review* 101, 105, 166.

to teach those subject areas'.<sup>67</sup> The case was thereafter remanded for trial, during which the Judge Leland Degrasse Jr heard 72 witnesses over the course of seven months of testimony, and in which 4,300 exhibits were filed with the Court.<sup>68</sup> After wading through enormous amounts of (often conflicting) expert testimony, the judge concluded in 2001 that New York had violated the education article. In *CFE II* (2003), the Court of Appeals found that a sound, basic education, as set out in *CFE I* and elaborated by the trial judge, meant an 'opportunity for a meaningful high school education', though refused to peg the meaning to any particular standard.<sup>69</sup> It also upheld the trial judge's factual findings. It further ordered the State of New York to ascertain what the cost of a sound, basic education was in the city of New York (rather than the entire State), and ordered a compliance deadline of 13 months from the date of the decision.

After *CFE II*, the Governor of the State ordered the creation of the New York State Commission on Education Reform.<sup>70</sup> The Commission, after much work and just over four months short of the deadline, found and reported that the 'spending gap' for New York City schools was US\$1.93 billion per annum. Governor Pataki thereafter promised to meet and in fact exceed this amount, but he could squeeze no more than a miserly additional US\$300 million from the legislature. When the deadline expired and the matter came again before the trial judge, the judge appointed a panel of three Referees (similar to special masters, discussed above). The Referees heard from many witnesses, including the Governor, and then decided that the Commission's methodology and thus its conclusions were flawed. The Referees found, and the trial judge accepted, that the spending gap was in fact US\$5.63 billion per annum. This decision was set aside on appeal to the Appellate Division, which found that the trial judge had wrongly set aside a determination that was 'arguable and reasonable'.<sup>71</sup> Even though much of the Appellate Division's judgment concerned the need to show judicial deference – saying, for example, '[i]t is not for the courts to make education policy' – in fact it 'directed' the legislature to 'consider' an annual funding increase of 'at least' something between US\$4.7 billion and US\$5.63 billion, and 'that they appropriate such amount, in order to remedy the constitutional deprivations found in *CFE II*'.<sup>72</sup> And for good measure, it ordered them to provide US\$9.179 billion for a one-off capital improvement spending programme! (Two of five judges dissented, arguing in strong terms that this remedy did not go far enough.) On appeal, in the final episode of the saga, the Court of Appeals reversed and found that it was appropriate to defer to the Commission's figure of US\$1.93 billion as reasonable (with the Chief Justice dissenting on this point), and further that the capital improvement program was no longer necessary.<sup>73</sup> There was a great deal of sophistication to the litigation over these several

<sup>67</sup> *Campaign for Fiscal Equity v State of New York*, 86 NY 2d 307, 316, 317 (Ct App 1995) (United States) [*CFE I*]. The sequence of quotations is taken from *CFE III*, n 72 below. In New York, the Supreme Court is the court of first instance. Appeals lie to the Supreme Court, Appellate Division, and from there to the NY Court of Appeals, which is the final court of appeal on state law matters.

<sup>68</sup> *Campaign for Fiscal Equity v State of New York*, 719 NYS 2d 475 (Sup Ct 2001) (United States). This case is not reported as one of the 'CFE' cases, as that abbreviation is reserved for the Court of Appeals cases. The figures are reported by Chief Judge Kaye in *CFE II* (n 69 below) at 902.

<sup>69</sup> *Campaign for Fiscal Equity v State of New York*, 100 NY 2d 893, 906, 908 (2003) (United States) [*CFE II*].

<sup>70</sup> The entire story as discussed here is told in *CFE III* (n 73 below).

<sup>71</sup> *Campaign for Fiscal Equity v State of New York*, 29 AD 3d 175, 184 (1st Dept, App Div 2006) (United States).

<sup>72</sup> *Campaign for Fiscal Equity v State of New York*, 29 AD 3d 175, 187, 189–91 (1st Dept, App Div 2006) (United States).

<sup>73</sup> *Campaign for Fiscal Equity v State of New York*, 8 NY 3d 14 (Ct App 2006) (United States) [*CFE III*].



cases, as well as sage campaigning out of court by CFE and other groups, which helped to marshal expertise and public support.<sup>74</sup>

How out of the ordinary was the CFE litigation? One critical author called it the 'peak' of the 'adequacy movement',<sup>75</sup> but other extraordinary cases are not too hard to come by. In *Montoy v Kansas* (2005), the Supreme Court of Kansas ordered the legislature to provide an additional US\$285 million in school funding over the subsequent two years, which in per capita terms (and presumably revenue implications) is probably of comparable importance for Kansas as the CFE litigation was for the State of New York.<sup>76</sup> In *Abbott v Burke XXI* (2011), the New Jersey Supreme Court ordered an increase in funding that would amount to roughly US\$500 million, though that was only one judgment in a long saga in which the courts ordered legislative action that doubtless resulted in a far greater outlay.<sup>77</sup> Quite apart from these standout remedies, the volume of litigation itself is remarkable. Claimants have challenged the constitutionality of school-finance systems in at least 43 States.<sup>78</sup> Scholars working in the field of educational litigation frequently refer to three waves, roughly divisible between those cases challenging educational equity (ie de facto or de jure discrimination), and those challenging adequacy.<sup>79</sup> The first and second waves were equity cases under the federal and state constitutions respectively, the latter being the preferred route after *San Antonio v Rodriguez* (1973) largely cut off the former. Seven state constitutional equity (second wave) cases between 1973 and 1988 succeeded in invalidating school finance systems, with a further 15 being unsuccessful.<sup>80</sup> The third wave concerned adequacy cases under state constitutions, and they have had the highest success rate. State supreme courts have from 1998 to the present overturned the school-finance systems in at least 21 States on adequacy grounds, rejecting only 11 challenges.<sup>81</sup> The authors of a book on the subject declare that there are nearly 7,000 education cases (encompassing constitutional and non-constitutional cases) heard annually in state and federal courts.<sup>82</sup>

<sup>74</sup> See MA Rebell, *Courts and Kids: Pursuing Educational Equity through State Courts* (Chicago IL, University of Chicago Press, 2009) 97–103. Rebell was counsel in the CFE litigation.

<sup>75</sup> See AA Lindseth, 'The Legal Backdrop to Adequacy' in EA Hanushek (ed), *Courting Failure: How School Finance Lawsuits Exploit Judges' Good Intentions and Harm our Children* (Stanford CA, Hoover Institution Press, 2006) 34. Lindseth was counsel for the State in the CFE litigation.

<sup>76</sup> *Montoy v Kansas*, 279 Kan 817, 845; 112 P 3d 923, 940 (3 June 2005) (United States).

<sup>77</sup> *Abbott v Burke*, No M-1293-09, (NJ May 24 2011) (United States) (*Abbott XXI*). In *Abbott v Burke*, 185 NJ 612 (December 2005) (United States) (*Abbott XIV*) the Supreme Court lists prior remedial responses to court rulings.

<sup>78</sup> See SE Murray, WN Evans, and RM Schwab, 'Education-Finance Reform and the Distribution of Education Resources' (1998) 88 *The American Economic Review* 789 and esp 791–94. The website of the National Education Access Network ([schoolfunding.info/legal-developments/](http://schoolfunding.info/legal-developments/)) puts the figure at 45 States.

<sup>79</sup> See WE Thro, 'The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation' (1990) 19 *Journal of Law and Education* 219; M Heise, 'State Constitutional Litigation, Educational Finance, and Legal Impact: An Empirical Analysis' (1995) 63 *University of Cincinnati Law Review* 1735; J Dinan, 'School Finance Litigation: The Third Wave Recedes' in JM Dunn and MR West (eds), *From Schoolhouse to Courthouse: The Judiciary's Role in American Education* (Washington DC, Brookings Institution Press, 2009) 96.

<sup>80</sup> Dinan, 'The Third Wave Recedes' (n 79 above) 97–98.

<sup>81</sup> Dinan, 'The Third Wave Recedes' (n 79 above) 98; see also, for earlier data, Murray, Evans, and Schwab, 'Education-Finance Reform and the Distribution of Education Resources' (n 78 above) 789, 791–94; Rebell, *Courts and Kids* (n 74 above) 2–3.

<sup>82</sup> CE Finn Jr, 'Foreword' in Dunn and West, *From Schoolhouse to Courthouse* (n 79 above) vii at x. These are presumably not limited to state constitutional cases.



## III. THE SECOND IRONY: MIXED RESULTS

The second great irony is that this comparatively interventionist judicial approach has not brought unequivocal success. It has generated quite ambivalent reactions by numerous well-informed commentators who see the value of a stronger American welfare state. A comprehensive survey of the studies is beyond the scope of this chapter. A snapshot can portray, however, their general tenor.

## A. Potentially Good Results

Some outcomes in the various cases discussed above seemed good.

*(i) Increased Funding*

The highly rigorous and comprehensive study by the economists Murray, Evans and Schwab examined adequacy litigation by looking at education spending within 46 States over a period of five years. They concluded that ‘court-ordered reform raises spending in the poorest districts by eleven percent, raises spending in the medium district by eight percent, and leaves spending in the wealthiest districts unchanged’.<sup>83</sup> Those states with school finance cases had tended to increase funding available for schooling without reduction for other social services.<sup>84</sup> Litigation in the area of special educational rights for disabled children had an immediate and profound impact on funding in that area, doubling state spending within a period of three years after a few landmark cases, which themselves were the direct cause of the passage of a major statute.<sup>85</sup> The same trends are visible in the holdings of educational adequacy cases reviewed in Section II above, and others have noted that a number of state legislatures have raised taxes in response to adequacy judgments against them.<sup>86</sup>

*(ii) Compelling the Enactment of Reform Legislation*

Many of the cases discussed above prompted new legislation. Melnick shows how the drafters of the Education of all Handicapped Children Act (1975) themselves admitted to being ‘influenced and instructed’ by court decisions, and viewed the law they had passed as having ‘codified the rights already spelled out in earlier court decisions’.<sup>87</sup> John Dinan records that ‘political resistance to school finance rulings has in nearly all instances been overcome by state courts that eventually compelled enactment of reform legislation’.<sup>88</sup> The same was evident in the disability and AFDC litigation discussed above. The *CFE*, *Montoy*, and *Abbott v Burke* litigations discussed above, for example,

<sup>83</sup> Murray, Evans and Schwab, ‘Education-Finance Reform and the Distribution of Economic Resources’ (n 78 above) 804.

<sup>84</sup> *ibid.*

<sup>85</sup> see Melnick, *Between the Lines* (n 6 above), section II, and for facts mentioned here, see esp ch 7 and 156.

<sup>86</sup> Dinan, ‘The Third Wave Recedes’ (n 79 above) 105.

<sup>87</sup> Melnick, *Between the Lines* (n 6 above) 135 (quoting Senator Robert Stafford).

<sup>88</sup> Dinan, ‘The Third Wave Recedes’ (n 79 above) 103.

all resulted in reform legislation.<sup>89</sup> This type of impact answers some of the concerns of those who are sceptical of judges' capacity to carry out more systematic reform. Legislatures provide the flexibility, diverse input, and processes that facilitate the complex task of building welfare programmes. If court judgments merely set these faculties in motion, then the competence objection is at least partly met. Of course, how much it is met depends on the extent to which legislatures have any discretion to apply their own judgement.

(iii) *Administrative Collaboration*

As discussed above, the *Lau* decision on second-language education rights expressly interpreted and enforced agency guidelines on the subject. The agency, in turn, amplified the court's holding by issuing revised guidelines known as the 'Lau remedies', though these were abandoned under President Reagan in 1981.<sup>90</sup> When the Reagan administration introduced the disability reviews in 1981, a number of State governors defied the Social Security Administration (SSA) and Martha Derthick found that they 'would not have . . . had they not been encouraged, and even in some instances commanded, to do so by the federal courts'.<sup>91</sup> In a number of disability cases, the courts effectively buttressed persons within agencies or other bureaucracies that deplored the practices considered illegal by plaintiffs, but felt powerless to counteract other players in the system.<sup>92</sup> Furthermore, structural reform cases bring a range of diverse resources and staff to bear on the problem. Melnick was struck by the similarity between court-mandated educational reforms and those initiated by superintendents of schools.<sup>93</sup>

(iv) *Reduction of Educational Inequity*

The study by Evans, Murray and Schwab found that court-mandated reform of school-finance systems 'reduces within-state inequality in spending by 19–34 percent' and that 'the gains in equality are obtained by increasing spending in the poorest districts while leaving spending in the richest districts unchanged'.<sup>94</sup> Although results are not uniform on the point, even studies that are sceptical of adequacy cases tend to acknowledge a modest improvement in equity.<sup>95</sup>

<sup>89</sup> See also Rebell, *Courts and Kids* (n 74 above) 100–101, on the Education Budget Reform Act of 2007–2008 in the State of New York.

<sup>90</sup> P Gándara, R Moran and E Garcia, 'Legacy of *Brown*: *Lau* and Language Policy in the United States' (2004) 28 *Review of Research in Education* 27, 29–30, 38.

<sup>91</sup> M Derthick, *Agency Under Stress* (Washington DC, Brookings Institution Press, 1990) 45.

<sup>92</sup> In AFDC cases, consider Melnick, *Between the Lines* (n 6 above) 71–72, 140–45; Feeley and Rubin, *Judicial Policy Making in the Modern State* (n 47 above) 307–8.

<sup>93</sup> Melnick, 'Taking Remedies Seriously': Can Courts Control Public Schools? in J Dunn and M West (eds), *From Schoolhouse to Courthouse: The Judiciary's Role in American Education* (Washington DC, Brookings Institution Press, 2009) 31. For an elaboration of this point, see Feeley and Rubin, *Judicial Policy Making in the Modern State* (n 47 above) ch 7.

<sup>94</sup> Murray, Evans, and Schwab, 'Education-Finance Reform and the Distribution of Economic Resources' (n 78 above); see also D Card and AA Payne, 'School Finance Reform, the Distribution of School Spending and the Distribution of Student Test Scores' (2002) 83 *Journal of Public Economics* 49.

<sup>95</sup> Dinan, 'The Third Wave Recedes' (n 79 above) 105 (claiming results are 'mixed', and see esp fns 69 and 70); Melnick, 'Taking Remedies Seriously' (n 93 above) 27; C Berry, 'The Impact of School Finance Judgments on State Fiscal Policy' in MR West and PE Peterson (eds), *School Money Trials: The Legal Pursuit of Education Adequacy* (Washington DC, Brookings Institution Press, 2007) (finding modest equity improvements).

## B. Failure to Improve

Sometimes the evidence suggests that reform litigation has led on to little positive change, and fits well within the claim advocated famously by Gerald Rosenberg that courts offer a ‘hollow hope’ for significant social change.<sup>96</sup>

### (i) *Poor Administrative Response*

Two of the leading experts on school funding reform litigation find that ‘there is scant evidence that the numerous school finance judgments issued by state courts since the 1970s have measurably improved student outcomes’.<sup>97</sup> Melnick expresses similar views about the success of school reform litigation, in contrast with that concerning reform of mental hospitals and prisons.<sup>98</sup> And Jerry Mashaw’s findings (along with colleagues) concerning the impact of judicial review on disability determinations were damning: ‘the tens of thousands of judicial review proceedings that have been held since the disability program’s inception have either had no perceptible impact on its functioning or have made it worse’.<sup>99</sup> Erkulwater found that the Americans with Disabilities Act ‘failed to live up to its expectations’ due in part to the fact that employment of the disabled did not rise despite the economy otherwise flourishing and in the midst of retrenchment of other benefits.<sup>100</sup>

### (ii) *Achievements Blunted by Political Backlash*

Some cases might best be characterised as one step forward, and either one or two steps back. The worst example may be the introduction of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) in 1996, which replaced AFDC with Temporary Assistance for Needy Families, curtailed eligibility for welfare benefits by imposing a five-year lifetime cap for receipt of federal benefits under the program, restrained judicial control of eligibility requirements, and legislatively reversed an important judicial decision.<sup>101</sup> It is hard to know the extent to which court cases contributed to the adoption of PRWORA, but the evidence suggests they played some role, possibly a strong one because as Melnick shows, the AFDC litigation was to ‘unquestionably increase the fiscal pressures on high benefit states . . . and led the “intergovernmental lobby” to become a leading proponent of comprehensive reform.’<sup>102</sup> Quite apart from welfare reform, in state constitutional law, it has not been uncommon for states to amend their constitutions if they disliked a particular judgment.<sup>103</sup>

<sup>96</sup> Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change* (Chicago IL, University of Chicago Press, 1991).

<sup>97</sup> MR West and JM Dunn, ‘The Supreme Court as School Board Revisited’ in *From Schoolhouse to Courthouse* (n 79 above) 3 at 10.

<sup>98</sup> Melnick, ‘Taking Remedies Seriously’ (n 93 above).

<sup>99</sup> JL Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (New Haven CT, Yale University Press, 1985) 7.

<sup>100</sup> Erkulwater, *Disability Rights and the American Social Safety Net* (n 7 above) 235.

<sup>101</sup> *Sullivan v Zebley*, 493 US 521 (1990) (United States). Also see AR Anderson, ‘Disabled without Benefits: The Impacts of Recent Social Security Reforms on Disabled Children’ (1999) 41 *Boston College Law Review* 125.

<sup>102</sup> Melnick, (n 6 above) 112, and see ch 6 generally.

<sup>103</sup> Hershkoff (above n 53) and accompanying text.

(iii) *Problem of Scarcity and Polycentricity*

The results reported by Evans, Murray and Schwab were encouraging because they claimed to show that increases in spending were not accompanied by decreases in other social services spending. If true, it is not always so. Mashaw reports that the costs of *Goldberg* hearings for ineligible persons were ultimately paid for by restricting benefits levels for the eligible recipients.<sup>104</sup> There is evidence also of paying for court-mandated expansions of AFDC eligibility with decreased benefits levels.<sup>105</sup> The overriding concern is of course that the 'unfunded mandates' imposed by courts are ultimately paid for either by contracting eligibility or shifting money around within social services spending. Tracking such things is incredibly difficult.<sup>106</sup>

C. Potentially Bad Results

One might argue that a failure of institutions to create significant social reform is not a damning verdict if they manage to help some people along the way. But a 'half a loaf is better than none' argument still must contend with evidence of setbacks.

(i) *Defensive Behaviour and Other Litigation Costs*

According to West and Dunn, a national survey conducted in 2004 found that up to 82 per cent of teachers and 77 per cent of principals engage in 'defensive teaching to avoid legal challenges'.<sup>107</sup> Robert Kagan's study of 'adversarial legalism' in America chose the welfare state as one site to expose the phenomenon: '[i]n a regime of adversarial legalism, litigation bred more litigation, conflicting decisions, legal complexity, and legal uncertainty'.<sup>108</sup> Erkulwater found that the Americans with Disabilities Act manifested the 'drawbacks of a policy premised on litigation'.<sup>109</sup>

(ii) *Lengthy Litigation Periods with Unclear Political Accountability*

The length of litigation itself creates problems because the bureaucracy under order is often no longer subject to effective political control. Sandler and Schoenbrod refer to the team of attorneys, acting together with judges, as 'the controlling group' of the bureaucracy.<sup>110</sup> Were structural reform cases of short duration and taken on the heels of comprehensive bureaucratic or political failure, this objection would have little bite. Yet in the *Jose P Anbach* case in New York City, a special education case under a federal statute, the litigation endured at least 24 years.<sup>111</sup> Similarly, the *Abbott v Burke* school

<sup>104</sup> Mashaw, *Bureaucratic Justice* (n 99 above) 4.

<sup>105</sup> Melnick, *Between the Lines* (n 6 above) 97.

<sup>106</sup> King, *Judging Social Rights* (n 24 above) 258.

<sup>107</sup> West and Dunn, 'The Supreme Court as School Board Revisited' in *From Schoolhouse to Courthouse* (n 79 above) 3.

<sup>108</sup> R Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge MA, Harvard University Press, 2001) ch 8 and 171.

<sup>109</sup> Erkulwater, *Disability Rights and the American Social Safety Net* (n 7 above) 232.

<sup>110</sup> R Sandler and D Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* (Newhaven CT, Yale University Press 2003) 61–67.

<sup>111</sup> Discussed (*ibid*) ch 3.

finance litigation stretched from its first ruling in 1985 to the most recent in 2011 (called *Abbott XXI*). There are many other examples, including those from Texas (six years), New Hampshire (nine years), though the most recent trend is to wind up these cases.<sup>112</sup>

(iii) *Undue Influence of Attorneys*

In the context of a New York special education case, Sandler and Schoenbrod quote an educational staff member as saying '[t]he lawyers would make education decisions, and the educators would say, "we can live with that"'.<sup>113</sup> The first duty of an attorney is to her client rather than the public at large, and she will have incentives for zero-sum victories rather than the messy compromises that are indispensable in politics. Attorneys invite testimony by partisan expert witnesses who may be inclined to mislead and simplify, or limit the court's consideration to a narrow range of options.<sup>114</sup> Worse, at times the legal team may not truly represent the group as they believe. In the complex desegregation case of *Missouri v Jenkins*, for instance, 'a local attorney found a handful of parents willing to let their children serve as plaintiffs and went on to be recognized by the court as the representative for every student in the district'.<sup>115</sup> Joshua Dunn explains how dissatisfaction with the ongoing litigation and the plan that eventuated grew from cool reception to outright hostility (including from the local NAACP chapter), and included elements that 'infuriated the black community' and prompted a coalition of groups to file suits challenging both the decree and the representation.<sup>116</sup>

(iv) *'Sweetheart' Litigation*

Donald Horowitz observes that '[n]ominal defendants are sometimes happy to be sued and happier still to lose'.<sup>117</sup> Melnick quotes an agency official mentioning that sometimes 'named defendants have spent days preparing defences for the suit, and nights assisting the plaintiffs to prepare their arguments'.<sup>118</sup> Why so? Public service delivery is far from monolithic. States battle the feds, street-level bureaucrats fight management, professionals chafe against bureaucratic imperatives, and agency officials must manage scarce resources and defend a budget against the two fronts of professional voraciousness and political retrenchment. The resulting mix can be an alliance of the virtuous using duplicity to obtain changes that ordinary politics will not furnish.

<sup>112</sup> Dinan, 'The Third Wave Recedes' (n 79 above) 103, 106–12. cf Rebell, *Courts and Kids* (n 74 above) 68 (arguing that premature relinquishing of jurisdiction was unproductive in the *Montoy* litigation in Kansas (n 76 above)).

<sup>113</sup> Sandler and Schoenbrod, *Democracy by Decree* (n 109 above) 63.

<sup>114</sup> West and Dunn, 'The Supreme Court as School Board Revisited' (n 79 above) 9; Melnick, *Between the Lines* (n 6 above) 160. The trial transcript in the *CFE* case, above n 67, was replete with conflicting expert testimony.

<sup>115</sup> See generally Dunn, *Complex Justice* (n 29 above) ch 2. The quote is from West and Dunn, 'The Supreme Court as School Board Revisited' (n 79 above) 6.

<sup>116</sup> Dunn, *Complex Justice* (n 29 above) 148, 150. cf 165 (continued NAACP support for attorney at the Supreme Court). For similar observations, see Sandler and Schoenbrod, *Democracy by Decree* (n 109 above) 125.

<sup>117</sup> D Horowitz, 'Decreeing Organizational Change' (n 50 above) 1294–95.

<sup>118</sup> Melnick, *Between the Lines* (n 6 above) 148.

*(v) Fragmentation of Policy Efforts*

Litigation does cause bureaucratic fragmentation which, if change is constant and meta-static, has damaging consequences. That describes the situation faced by the Social Security Administration: 'In 1992, the SSA confronted forty-six threatened or pending class action lawsuits and thousands of individual lawsuits dealing with issues pertaining to its disability programs'. As a result, 'different standards are now in operation across the country depending on the judicial circuit in which someone lives'.<sup>119</sup> This type of fragmentation, according to agency officials, 'flew in the face of everything Social Security stood for' because in their eyes equity required equal treatment and this was a fight they often took to the states in their effort to maintain a just administration.<sup>120</sup> Some authors advocate a role for public law as 'destabilization rights',<sup>121</sup> though the idea of localism, welfare devolution and experimentation have in the United States probably done more to facilitate welfare retrenchment than to extend public services.

*(vi) Uncertainty and Disruption*

One episode in the case of *Missouri v Jenkins* illustrates the potential for uncertain consequences and the need for adaptation that can sometimes sit uneasily with the paradigm of legal control. In his effort to desegregate Kansas City schools, Judge Clark mandated the adoption of a quota by which for every six black children at a school, there must be four white ones. Yet since the district could not even 'come close' to filling all the 'white seats' in the designated schools, many black children became unable to attend the school of their choice despite the availability of space. By 1989, there were 7,000 black students on waiting lists despite the availability of thousands of seats.<sup>122</sup> It is of course easy to cherry pick and parade failures like this, and the judge did ultimately rescind the plan. Yet as a general matter, the institutional integrity of judging creates inertia, because no judge wants to declare rights on Monday and abandon them by Friday.<sup>123</sup>

**D. Any Conclusions?**

It is hard to draw firm conclusions from the foregoing (and necessarily inexhaustive) survey. As Feeley and Rubin show, there is deep disagreement on what counts as a good or bad outcome in many of these cases.<sup>124</sup> Are additional resources a boon or an administrative work-around imposing unseen costs elsewhere? Is a legislative response to a court order a victory, or does it conceal retrenchment and evasion? And are legislative reforms the application of legislative democratic faculties, or the grudging political acceptance of a court-mandated conclusion? Is uncertainty a problem, or does forcing a bureaucracy to accept the consequences of pervasive injustice and manifest illegality

<sup>119</sup> Erkulwater, *Disability Rights and the American Social Safety Net* (n 7 above) 142. See also Melnick, *Between the Lines* (n 6 above) 108.

<sup>120</sup> Erkulwater (n 7 above) 141. See also Derthick, *Agency Under Stress* (n 91 above) 141–43.

<sup>121</sup> See below, text to n 128.

<sup>122</sup> Dunn, *Complex Justice* (n 29 above) 147–48.

<sup>123</sup> Further on uncertainty, see Erkulwater, *Disability Rights and the American Social Safety Net* (n 7 above) esp 144; Melnick, *Between the Lines* (n 6 above) 108; Derthick, *Agency Under Stress* (n 91 above) 132–35.

<sup>124</sup> Feeley and Rubin, *Judicial Policy Making in the Modern State* (n 47 above) ch 9.

merely force a crisis to the political fore? How much attorney control is an acceptable cost for the infusion of millions of dollars of additional resources, discounted by the judicial capacity to vary existing orders and hear from additional interveners? These questions defy easy or perhaps any answers, in the absence of which sweeping conclusions are untenable. It would be foolish, however, to disregard empirical findings or to dismiss instrumentalist arguments either in favour of or against court activity altogether. One non-sweeping conclusion that one can take from the survey above, is that the surprisingly interventionist results have not been a ringing success. ‘Ambivalence’ is probably the most accurate (if not charitable) description of the prevailing attitudes among those scholars who evidently support a strong welfare state and who have studied the question most closely.

#### IV. POTENTIAL CAUSES

It is difficult to be sure about why America has produced this mixture of low public commitment to social spending, comparatively robust judicial interventionism, and results that frequently confound the optimists and alarm the sceptics. There seem to me to be at least two relevant factors contributing to this outcome. The first is the rights and litigation culture in America. On the one hand, there is a greater reluctance there to engage in the balancing of constitutional rights, and a more dominant view that rights are trumps that are resistant to any trade-offs. This leads them on the one hand to draw the circle of rights more narrowly, but on the other to extend very potent protection to those interests that are constitutionally deemed rights. Yet as Mark Tushnet has observed, it may be that a model of more weak-form review is superior to a strong rights and remedies model in the context of socio-economic rights adjudication.<sup>125</sup> Furthermore, the development of the public law litigation paradigm in America has allayed at least some of the institutional competence concerns, by facilitating the introduction of greater amounts of information, and increased judicial flexibility at adapting to new developments as structural reform programmes are rolled out.

A second, and in my view more important, difference is that there appears to be a breakdown in the extent of inter-institutional collaboration observed between judges, the executive and legislature in many of such cases. In many countries, there is a good-faith political acceptance of the idea of social rights as basic human rights and the need for a well-functioning, reasonably well-funded, and fairly administered welfare state. Yet some of the stories of bureaucratic obstructionism or underfunding in the US cases are simply remarkable. Joshua Dunn reports the state of the Kansas City schools that became subject to the controversial desegregation in *Missouri v Jenkins* as ‘squalid’, over and above the de facto segregation: ‘In some buildings, decayed asbestos fell from pipes, windows fell out of rotted panes, ceiling tiles hung precariously, and hallways reeked of urine’.<sup>126</sup> In *Brown v Plata*,<sup>127</sup> the Supreme Court found that prisons designed for 80,000 inmates in fact held

<sup>125</sup> M Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton NJ, Princeton University Press, 2008) (and indeed for protecting all rights – see ch 8).

<sup>126</sup> Dunn, *Complex Justice* (n 29 above) 57, 137 (also mentioning non-functioning heating and air-conditioning).

<sup>127</sup> *Brown v Plata* (n 46 above).



twice that number and thus prevented provision of adequate medical care, leading to those with serious mental health problems being held in tiny metal cages while awaiting proper hospital beds. The Court even appended photographs to its judgment. These types of cases shock the conscience, and pleas for deference to expertise are as inapt as those calling for democratic restraint. Yet another example – a direct threat to the rule of law – was a deliberate policy of ‘non-acquiescence’ in the Social Security Administration, as elsewhere in government, whereby this massive and important agency would deliberately limit its observance of a judicial ruling to the immediate case at bar.<sup>128</sup>

Simon and Dorf write that ‘[a] public law destabilization right is a right to disentrench or unsettle a public institution when, first, it is failing to satisfy minimum standards of adequate performance and, second, it is substantially immune from conventional political mechanisms of correction’.<sup>129</sup> Clearly, the authors envisage an extremely dysfunctional public bureaucracy that idles along under inertia and is immune from political control, manifestly disregarding its public law obligations. Yet this is not the norm in most comparable countries. Nearly all the social rights cases I have considered from Britain, Canada and South Africa were not caricatures of chronic administrative incompetence and political indifference, but were rather the result of deliberate state policies that were backed by political arguments or assertions of resource scarcity.<sup>130</sup>

The analysis in Edwin Cameron’s [chapter \(sixteen\)](#) in this volume supports this view, as does Anashri Pillay’s review (in [chapter seventeen](#)) and analysis of not only the socio-economic rights jurisprudence of the Indian Supreme Court, but of its basic structure doctrine as well. In my view, the work of Neil Komesar on comparative institutional competence sheds light on all three of our chapters. In his book *Imperfect Alternatives*, Komesar argues that ‘tasks that strain the capacities of one institution may be wisely assigned to it if the alternatives are even worse’.<sup>131</sup> However, Komesar’s equally important point is that commentators tend to generate demand-style arguments for institutional roles (by indicating flaws with the alternatives) that are insensitive to the supply-side problems of having such institutions carry out the task.<sup>132</sup> In his later work, *Law’s Limits*, Komesar observes that institutions tend to move together.<sup>133</sup> It is the chronic failings of one institution (eg bureaucracy) that may, ironically, place demand-side pressures that strain the capacities of other institutions (eg courts), in turn generating new pathologies. This observation is borne out, in my view, in both the American and Indian brands of exceptionalism about social rights,<sup>134</sup> as well as in the post-Apartheid South Africa’s conjunction of a reasonably good-faith democratic and bureaucratic commitment to

<sup>128</sup> The story is told in Derthick, *Agency Under Stress* (n 91 above) 135–51; see also Erkulwater, *Disability Rights and the American Social Safety Net* (n 7 above) 124–25, who reproduces excoriating judicial criticism from the bench in a range of federal court decisions.

<sup>129</sup> Sabel and Simon, ‘Destabilization Rights’ (n 49 above) 1062. For assessment, see King, *Judging Social Rights* (n 24 above) 306–11.

<sup>130</sup> See generally, King, *Judging Social Rights* (n 24 above).

<sup>131</sup> N Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (Chicago IL, University of Chicago Press, 1994) 6.

<sup>132</sup> *ibid.*

<sup>133</sup> N Komesar, *Law’s Limits: The Rule of Law and the Supply and Demand of Rights* (Cambridge, Cambridge University Press, 2001) 23, also observing that ‘all institutions deteriorate as numbers and complexity increase’.

<sup>134</sup> Evidence for this is found in State adequacy litigation: K Swenson, ‘School Finance Reform Litigation: Why Are Some State Supreme Courts Activist And Others Restrained?’ (2000) 63 *Albany Law Review* 1147, 1179: ‘The states that spend the least per pupil on public education are more likely to suffer judicial intervention in education policy’.

social rights with a more restrained, incrementalist mode of judging in constitutional social rights cases.

## V. CONCLUSION AND LESSONS FOR OTHER COUNTRIES

The attitude of American courts towards judicially enforceable welfare rights can indeed be exceptional, but in ironic ways. They have embroiled themselves more deeply into some aspects of welfare administration than have the judiciaries in comparable countries, and the results have not been what many of those who advocate greater judicial protection of social rights desire. The causes of this remarkable constellation are hard to discern, but it seems more than likely that an abiding faith in rights and courts, when combined with chronic underfunding of public services, results in a judicial readiness to stand up for values whose principled implications often take judges deep into administrative territory.

Despite the uniquely American context, the experience should give foreigners pause for careful thought (as so much else in its legal tradition does). Some lessons do emerge. Of the high quality law and politics studies examined above, the sceptical studies tend to outnumber the favourable ones. Studies by supporters of legal welfare rights have tended to present narratives and legal victories, rather than studying the consequences and causes of the litigation. Studies of legal mobilisation have been reinvigorated recently, and it may be that more positive studies of the social rights litigation will emerge.<sup>135</sup> Reading between the lines in some of these cases, in policy documents and other responses to court judgments, one gets the sense that there are significant stories to tell here that will even out somewhat the empirical picture.<sup>136</sup> At any rate, the experience once again reaffirms the value of empirical legal studies in developing a better understanding of the dynamics of litigation.

Although we have much with which to distinguish the American experience, it is also important not to dismiss it as a local peculiarity. There have been benefits, but also flaws. And many of the flaws betrayed by the record are precisely those highlighted by critics of judicial review and legalism in the area of social policy. These flaws include problems relating to adversarial legalism and defensive administrative behaviour, unintended consequences of litigation complexity, domination of bureaucracies by partisan advocates, the politicisation of courtrooms by means of interventions, and the introduction of inflexibility and fragmentation into bureaucracy.<sup>137</sup> That these sceptics' views have received some support from the experience does not deal a deathblow to social rights litigation,<sup>138</sup> but it

<sup>135</sup> See for example, the studies discussed in M McCann, 'Litigation and Legal Mobilization' and C Epp, 'Law as an Instrument of Social Reform' in KE Whittington, RD Kelemen, and GA Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford, OUP, 2010), chs 30 and 34 respectively.

<sup>136</sup> Feeley and Rubin's *Judicial Policy-Making in the Modern State* (n 47 above) is a highly illuminating example of a non-sceptical study that does this.

<sup>137</sup> On which see R Kagan, *Adversarial Legalism* (n 107 above); L Fuller, 'The Forms and Limits of Adjudication' (1978–79) 92 *Harvard Law Review* 353; RB Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review* 1669; C Harlow, 'Public Law and Popular Justice' (2002) 65 *Modern Law Review* 1; Mashaw, *Bureaucratic Justice* (n 99 above) and *Due Process in the Administrative State* (Newhaven CT, Yale University Press, 1985).

<sup>138</sup> In *Judging Social Rights*, I took care to articulate an approach that may be taken in certain countries having background political conditions not generally present in the United States (see 10–12) and which is, notably, distinctly crafted to overcome the key difficulties evident in the survey examined above. I make no claim there that such an approach would be suited to the United States.

certainly does require advocates to move beyond poaching cases of daring judicial protection from other jurisdictions with a blind eye to the greater context. Similarly, they should resist the inclination to treat progressive objections to social rights adjudication as hurdles to clear rather than bona fide egalitarian concerns about the best institutional method for securing a political endgame that is not in dispute.



# Index

## Ad hoc balancing

- abandonment, 84
- abstinence, 83, 85
- academic perspective, 64, 66–67, 71
- bright-line rules, 75, 79–80, 83, 85
- Canada, 64
- categorical alternatives
  - deportation of migrants, 77–78
  - restricting deadly force, 75–77, 94
  - road safety legislation, 81–82
  - violations of human dignity, 79–80
- categorical reasoning, 77
- collective self-determination, 67–68, 75
- conflicting interests, 63–64
- critiques, 66–68
- definitional balancing, 76
- disputed measures, 63
- European Court of Human Rights (ECtHR), 64–65, 73
- failure, 70, 75
- flexibility, 70
- formalist bias
  - anti-utilitarian telos, 66–67, 84
  - legal certainty, 66, 84
  - rights as legal rules, 66, 84–86
- Germany, 64–65
- global rise, 65
- incommensurable values and interests, 66
- indispensability, 66
- individual justice, 70
- individual rights and liberties 67–68, 70, 75, 83
- irrational element, 66
- Israel, 64
- judicial decision-making, 68–70
- judicial empowerment, 85
- judicial methodology, 76, 83
- judicial reasoning, 67
- judicial review, 68
- judicially constructed boundaries, 78
- justifications, 66
- methodological alternatives, 76
- political decision-making, 66
- political project, 71
- post-dictatorial situations, 85
- proportionality reasoning, 66–67, 76, 82
- proportionality test, 37–38, 59, 63, 72–73, 81–83
- public interests, 63
- right to life, 66
- rights-holders' interests, 63
- self-determination, 68, 83–85
- separation of powers, 71
- shortcomings, 70
- South Africa, 64
- theoretical perspective, 65, 67

transparency, 84

uniqueness, 70

US Supreme Court, 73

## Adjudicating pluralism

- human rights law, 11
- judicial distancing strategies, 16–25
  - see also* **Judicial distancing strategies**
- problem areas, 15–16
- rights interpretation, 13, 20–22
  - see also* **Rights interpretation**
- substantive diversity
  - addressees of human rights, 12
  - boundary conditions, 13–14
  - conflicting rights, 15
  - context-specific rights, 13
  - historical conditions, 14
  - judicial authority, 14
  - nature of human right, 12–13
  - overriding human rights, 14–15
  - portfolio approach, 13
  - rights-holders, 12
  - rights interpretation, 13
  - shared normative principles, 13
  - underlying unity, 13
  - universal right, 13

## Australia

- Australian Human Rights Commission, 278
- equality principle, 278
- freedom from religion, 274, 277
- fundamental rights, 259
- human rights adjudication, 11
- human rights protection, 259, 264–66, 278
- judicial activism, 26
- judicial borrowing, 24
- religion and the state
  - autonomy, 221, 278
  - employment practices, 221, 228, 263, 268–69
  - minority groups, 267
  - relationship, 260, 270–71, 277–78
  - religious autonomy, 259, 278
  - religious conformity, 221
  - religious discrimination, 228, 260–63, 265, 267–69
  - religious equality, 274, 276–77
  - religious tolerance, 266
- religious freedom
  - Australian Capital Territory, 264–65, 273
  - autonomy of mind, 264
  - autonomy of physical practice, 264
  - Bills of Rights, 264–65, 270, 273, 276
  - common law, 260, 266
  - Commonwealth, State and Territory legislation, 260, 262–64, 277
  - constitutional protections, 260–61, 267–68

**Australia (cont):**

- religious freedom (*cont*):
  - discrimination, 228, 260–63, 265
  - employment legislation, 263
  - federal structure, 260
  - freedom from the state, 267
  - human rights protection, 264–65, 278
  - judicial role, 264
  - legislative provisions, 259–60
  - religious practice, 265
  - religious schools, 271
  - religious symbols, 272–73, 276–77
  - Victoria, 264–65, 273
- religious institutions, 278
- religious instruction, 271–72
- religious schools
  - autonomy, 221
  - discriminatory conduct, 267–69
  - employment practice, 268–69
  - faith-based schools, 267
  - government support, 221, 266–67, 271, 274
  - religious ethos, 267–68
  - religious freedom, 271
- religious symbols
  - discriminatory action, 273, 276
  - display, 220–21, 225, 259, 272
  - funding, 272
  - legislative regulation, 276
  - proportionality test, 276
  - public life, 271, 274, 277–78
  - public schools, 267, 271–72, 274–75
  - religious freedom, 272–73, 276–77
  - religious pluralism, 271–72
  - restrictions, 272–73, 276–77
  - right to education, 271

***Binyam Mohamed case***

- background, 137
- cleared counsel, 152
- control principle, 138, 142, 153–54
- Court of Appeal, 141–43, 154
- disclosure of documents, 137–43, 154
- extraordinary rendition, 135, 138, 148, 158
- inhuman and degrading treatment, 137–38, 142
- Intelligence and Security Committee, 143–44, 146
- Norwich Pharmacal* jurisdiction, 137–38, 154–55
  - see also Norwich Pharmacal* jurisdiction
- public interest, 140, 142
- public interest immunity, 138, 140, 146, 152
- reactions, 143–46, 155
- torture, 137–38, 141
- US position, 139–42, 153

**Canada**

- ad hoc balancing, 64
- Canadian Charter of Rights and Freedoms, 81, 124, 161, 166–67, 170, 176, 283, 361
- citizen's rights, 18
- cleared counsel, 161–62, 164, 167–68, 171, 173–74, 176
- constitutional rights, 41
- deprivation of liberty

- classification decisions, 173, 175–76
- comparative borrowing, 161–62
- deportation, 164, 166
- detention, 164, 166
- fair hearings, 161
- gisting of evidence, 173
- Immigration and Refugee Protection Act, 166
- national security threats, 166
- secret evidence, 161, 164, 166–67
- security detentions, 181, 183
- special advocates, 181, 183, 204–5
- Supreme Court decisions, 161, 164, 166–67
- freedom of movement, 18
- judicial deference, 49
- limitation of rights, 43, 45–46
- minimal impairment test, 35
- national security, 22–23, 166
- necessity and balancing, 58
- necessity inquiry, 42–43, 45–49, 54, 57–58
- open justice, 119, 121–22, 124–25, 129–30
- proportionality, 22, 34–35, 38, 41, 74, 81, 88, 93
- social rights, 361
- socio-economic rights, 283

**Church autonomy**

- delegation of power, 220
- employment decisions
  - ECtHR decisions, 210
  - freedom of religion, 210
  - nature of institution, 210
  - nature of job, 209–10
  - non-discrimination, 210–11, 219–20
  - protection of interests, 210
  - religious employers, 209, 219
  - religiously motivated standards, 210, 217
  - South African cases, 210–11
  - UK cases, 210–11
  - US cases, 210–11
- freedom from the state, 209
- religious institutions, 220
- secular interference, 229–31, 237
- separation of church and state, 214

**Civil and political rights**

- autonomy, 302
- benefits, 302
- demarcation lines, 302
- dignity, 302
- enforcement, 296
- equality of status, 302
- framework, 283, 302
- general model, 315
- interpretation, 11, 17, 286, 303, 317, 321, 359
- judicial deference, 296
- judicial limits, 303
- margin of discretion, 304
- normative obligations, 302
- permissible review, 300–1, 304, 317
- proportionality, 296
- protection, 302–4, 316
- resource allocation, 303–4
- scope of interests, 302–3
- social claims, 302

- social rights review distinguished, 300–4, 306, 308, 317
- Cleared counsel**
  - access to information, 177
  - best practice, 171
  - Canadian position, 161–62, 164, 167–68, 171, 173, 176
  - classification decisions, 173, 175
  - common problems, 174–77
  - comparative borrowing, 161–62
  - fairness of proceedings, 161
  - legitimacy issues, 175–76
  - quality of evidence, 176
  - redacted information, 173–76
  - right to confront evidence, 175
  - secret evidence, 118
  - security detentions, 183
  - sharing of information, 176
  - transparency, 175
  - UK position, 161–63, 168–71, 173, 176–77
  - USA position, 162–63, 165, 171–74, 176–77
- Closed material procedures**
  - national security, 127–28, 133–34, 144, 156–59
- Deportation**
  - deprivation of liberty, 161, 164, 166
- Deprivation of liberty**
  - Canada, 161, 164, 166–68, 170, 173–76
  - cleared counsel, 161–62, 165, 172–73
  - common law protection, 170
  - deportation, 161, 164
  - detention, 161, 163–64
  - disclosure of evidence, 162–63, 165, 172
  - ECHR protection, 170–71, 176
  - fair hearing, 161–62, 170, 176
  - Guantánamo Bay
    - see* **Guantánamo Bay**
  - right to confront evidence, 163–64, 167–68, 170, 172, 174–75
  - secret evidence, 161–64
    - see also* **Secret evidence**
  - security detentions
    - see* **Security detentions**
  - UK position, 163–64, 168–70, 173, 176–77
  - US position, 162–66, 170–76
- Detention**
  - deprivation of liberty, 161, 163–64, 166, 168
  - Guantánamo Bay
    - see* **Guantánamo Bay**
  - security detentions
    - see* **Security detentions**
- Discrimination**
  - see* **Religious discrimination**
- European Convention on Human Rights (ECHR)**
  - civil rights, 361
  - deprivation of liberty, 170–71
  - domestic level, 7
  - freedom of assembly, 88
  - freedom of expression, 88, 121, 233
  - freedom of religion, 22, 88, 211–12, 216, 218, 220, 233
  - limitation clauses, 101–2
  - non-discrimination provisions, 212
  - positive obligation principle, 250–51
  - private and family life, 38, 78, 88, 220, 248–49, 251
  - prohibition of torture, 22, 283–84
  - right to education, 211
  - right to fair hearing, 162, 170, 176, 233
- European Court of Human Rights (ECtHR)**
  - ad hoc balancing, 64–65, 73
  - balancing of rights, 38, 91, 234–36, 270
  - child protection, 360
  - civil law tradition, 10
  - civil rights, 361
  - detention, 169
  - domestic jurisprudence, 7
  - fair proceedings, 197, 232–33
  - flexibility, 85
  - formalistic approach, 10
  - influence, 7
  - inhuman and degrading treatment, 366
  - judicial deference, 85
  - jurisdiction, 9
  - legitimate aim, 91
  - margin of appreciation, 23, 85
  - necessity, 91
  - open justice, 122–25, 127, 130
  - proportionality, 73, 88, 91
  - public interest, 91
  - religious discrimination, 234–36, 238, 270
  - religious institutions, 220
  - religious symbols, 211–12, 217–18, 224
  - religiously-affiliated employers, 210, 234–36, 270
  - restriction of rights, 101
  - social rights, 306, 309–10
  - socio-economic rights, 284
- Evidence**
  - see also* **Secret evidence**
  - constitutional rights adjudication, 110–11, 113–14
  - disclosure, 147, 149–51, 162–63, 165, 168–69, 172–73
  - gisting of evidence, 129–31, 168–69, 173, 175
  - human rights adjudication, 9
  - quality of evidence, 176
  - right to confront evidence, 163–64, 167–68, 170, 172, 174–75, 196
- Extraordinary rendition**
  - national security, 135, 138, 148–49, 158
  - US position, 148–49
- Freedom of religion**
  - collective group right, 241
  - ECHR protection, 22, 88, 211–12, 216, 218, 220, 233
  - employment cases, 210
  - individual right, 241
  - proportionality, 22
  - religion and the state, 216–17, 219
  - religious discrimination, 232–33
  - religious institutions, 220
- Fundamental rights**
  - optimisation requirements, 42
  - protection, 62
  - restriction, 61–62



**Germany**

- adjudication of rights, 103, 111
- constitutional order, 301
- German Constitutional Court
  - ad hoc balancing, 64–65
  - balancing, 103, 114
  - constraints on power, 102, 113–14
  - fundamental rights, 43, 47–48, 50
  - gradation theory, 103–104
  - level of scrutiny, 104, 111
  - limitation of rights, 41
  - means-end proportionality, 103, 114
  - precedent, 101
  - proportionality test, 33–37, 41, 72–73, 75, 77, 88, 102, 113–14
  - scale of scrutiny, 101
  - social rights, 312, 316, 360
- guaranteed rights 18
- minimal impairment, 114
- natural right, 102
- necessity, 102, 114
- racial hatred, 14
- religious discrimination, 235–36
- religious employers, 235–36, 247–49
- religious institutions
  - autonomy, 247–48
  - conflicting interests, 251
  - constitutional law provisions, 247
  - dismissal of employees, 247–52
  - ECtHR influence, 247–52, 258
  - employment contracts, 247–49
  - human rights protection, 248, 251–52, 258
  - positive obligation principle, 250–51
  - respect for private and family life, 248–49, 251
  - sphere sovereignty, 220, 247, 251–52, 258
  - status, 247
- self-determination, 85, 247–248
- social rights review, 301, 312, 316
- socio-economic rights
  - dignified minimum existence, 296–97
  - German Constitutional Court, 284, 296–97, 360
  - reasonableness review, 296

**Guantánamo Bay**

- classified information, 165–66
- cleared counsel, 165, 172–73
- detainees, 163–66, 171, 182
- due process, 171
- habeas corpus, 163, 165–66, 171, 173–74, 176
- hunger strike, 179–80
- statements from detainees, 166

**Human dignity**

- violations, 79–80

**Human rights**

- see also* Human rights adjudication; Human rights law
- bright-line rules, 67
- comparative approach, 4–8
- comparative law borrowing, 5
- conflicting rights, 15
- deontic character, 14, 65
- enforcement, 69

- entitlements, 64
- ethical and political acceptability, 4
- human rights norms, 69
- ideological differences, 3, 6
- individual liberties, 68
- judicial review, 10, 68
- law reform initiatives, 5
- level of abstraction, 15
- minimum guarantees, 83
- moral and ethical questions, 15
- overlapping legal space, 6
- policy prescription, 4
- politics of human rights, 5
- restriction of rights, 63–64
- scope, 3, 10
- self-determination, 67–68

**Human rights adjudication**

- ad hoc balancing, 66
  - see also* Ad hoc balancing
- adjudicating pluralism
  - see* Adjudicating pluralism
- alternative vision, 67
- appropriate justification, 15–16
- Australia, 11
- categorical style, 84
- constitutional rights, 32
- courts, 9
- credibility, 26
- differing legal regimes, 11
- differing styles, 9
- empirical legal studies, 25
- evidence, 9
- human rights litigation, 10–11
- human rights values, 10
- interference with rights, 31
- judicial competence, 15–16, 24–26
- judicial decision-making, 68–70
- judicial legitimacy, 15–16, 25–26
- judicial methodology, 69–70
- judicial review, 10, 68
- legal methods, 10, 15–17
- legislative protection, 68
- meaning, 8
- moral and ethical propositions, 15
- openness, 62
- originalism, 84
- potential conflict, 63
- portfolio approach, 13
- predictability, 78
- proportionality
  - see* Proportionality
- remedies, 9
- res judicata*, 70
- restriction of rights, 63–64
- statutory interpretation, 10
- transparency, 64

**Human rights law**

- see also* Human rights; International human rights law
- adjudicating pluralism, 11
- comparative understanding, 7–8
- diversity, 11

- effect, 4
- legal pluralism, 27
- meaning, 3–4
- theoretical level, 7–8
- Hungary**
  - judicial activism, 26
  - minority protection, 18
- India**
  - constitutional borrowing, 19
  - Directive Principles, 10, 340, 344, 346, 355–56
  - human rights adjudication, 13–14
  - Indian Supreme Court
    - socio-economic rights, 9, 282–83, 290–95, 339–49, 351–56
    - structure, 9, 292
  - minority protection, 18
  - social rights
    - conditional social rights thesis, 352
    - social rights review, 301
  - social-economic rights
    - access to land, 340
    - admissibility, 292
    - basic structure doctrine, 342–43, 375
    - competing corporate interests, 353
    - constitutional interpretation, 344–45
    - constitutional law, 339
    - cost of litigation, 353
    - directive principles of state policy, 10, 340, 344, 346, 355–56
    - economic and social duties, 340
    - enforcement of rights, 351
    - fundamental rights, 340, 344
    - generic medicines, 354
    - government commitment, 352
    - health care, 340, 344, 350–53, 356
    - HIV/AIDS treatment, 350–51
    - housing, 340, 345–47, 351, 356
    - human dignity, 346
    - Indian Supreme Court, 9, 282–83, 290–95, 339–49, 351–56
    - inequalities in wealth, 340
    - institutional challenges, 353
    - interventionist remedies, 332
    - judicial activism, 290–91, 294–95, 340, 343, 347, 355–56
    - judicial deference, 291–92, 340, 348–50, 355–56
    - judicial diversity, 354
    - judicial overload, 353
    - judicial review, 341
    - justiciable rights, 355–56
    - land reform, 341
    - legal authority and certainty, 354
    - legislative amendment, 342–43
    - negative obligations, 291
    - Non-Governmental Organisations, 353
    - positive obligations, 345
    - property rights, 341–42
    - protection, 25
    - public interest litigation, 343–44
    - right to education, 291, 340, 344–45, 349, 351, 353
    - right to food, 293, 348–49, 351–53, 356
    - right to life, 344, 346
    - right to water, 356
    - social action, 343, 351
    - social change, 347
    - social justice, 339, 347–48
    - state obligations, 332
  - International human rights law**
    - customary international law, 7
    - development, 6–7
    - domestic jurisprudence, 7
    - enforcement, 7
    - human rights treaties, 7
    - international law, 7
    - international tribunals, 7
    - proliferation of standards, 6–7
    - social rights 7
      - see also* Social rights
  - International law**
    - customary international law, 7
    - development, 7
    - domestic international law, 7
  - Islamic dress**
    - religion and the state, 212, 219, 224, 236
  - Israel**
    - ad hoc balancing, 64
    - Israeli Supreme Court
      - balancing analysis, 36
      - necessity inquiry, 43, 46, 49, 56–58
      - proportionality test, 91–92
      - security detentions, 181
      - separation barrier decision, 36, 56–57, 91–92
    - secret evidence, 119, 183, 186, 191–93
    - security detentions
      - Aberah* case, 195–97
      - administrative detentions, 182, 198
      - alternative dispute resolution, 181, 195, 198, 206
      - bargaining in shadow of the court, 202–4
      - courtroom dynamics, 198, 200
      - de-individualisation of court's decisions, 198, 200–1, 206
      - detention orders, 185–86, 188–90, 193–96
      - disclosure of information, 196–97
      - duties of state authorities, 195–96
      - ex-parte hearing, 194–95, 198, 204
      - fair proceedings, 197, 206
      - indefinite extensions, 186
      - individual dangerousness, 188–89
      - inquisitorial fact-finding, 206
      - judicial management model, 119, 183–84, 196–202, 204–6
      - judicial review, 180–81, 185, 187–88, 190–94, 202–3, 206
      - justification, 184, 188–89, 191–92
      - legal constraints, 188–89, 195, 206
      - legal regimes, 185–87
      - mass detentions, 205
      - mediation, 195, 206
      - military law, 186, 193
      - national security threats, 184
      - number of detainees, 184
      - open justice, 198, 201

**Israel (cont):**

- security detentions (*cont*):
  - place of arrest, 191
  - procedural flaws, 191–92, 194
  - release of detainees, 191–92
  - release orders, 181
  - repeat orders, 186
  - right to confront evidence, 196
  - secret evidence, 183, 186, 191–93, 195–96, 198–99, 202, 204, 206
  - security threats, 189, 204
  - state of emergency, 184–85
  - substantive justice, 199
  - Supreme Court decisions, 181
  - transparency, 198, 201–2, 206
  - uncontested one-sided information, 198–99
  - unlawful combatants, 187, 189, 193–94
- statutory interpretation, 10

**Judicial deference**

- European Court of Human Rights (ECtHR), 85
- necessity inquiry, 62
- proportionality, 22–23
- socio-economic rights, 282, 291–92, 329–30, 333, 340, 348–50, 355–56
- strict necessity, 47–49

**Judicial distancing strategies**

- adapting institutional capacity, 24–25
- balancing of rights, 18–19, 21–22
- descriptive approach, 18–20
- historical method, 17–19
- judicial borrowing, 23–24
- judicial review, 24
- meta-principles, 24
- normative reasoning, 19–20
- precedent, 23
- proportionality, 21–23

*see also* **Proportionality**

- public law litigation, 24
- textual interpretations 17–19

**Judicial reasoning**

- differing scholarly approaches, 3–4
- similarities and divergences, 3, 6

**Judicial review**

- ad hoc balancing, 68
- changing technology, 24
- human rights adjudication, 10, 68
- judicial distancing strategies, 24
- public interest immunity, 152
- security detentions, 180–81, 185, 187–88, 190–94
- socio-economic rights, 299–300, 341

**National security**

- abuse of process allegations, 158
- accountability, 159
- anti-terrorism measures, 157
- balancing of interests, 152, 158
- Binyam Mohamed* case
  - see Binyam Mohamed* case
- clash of legal cultures
  - common law, 152
  - ECHR compatibility, 153

- equality before the law, 152
- EU law, 153
- immunity of state officials, 152
- public interest considerations, 152–54
- UK courts, 152–54
- US position, 153–55

cleared counsel, 118

*see also* **Cleared counsel**

closed material procedure, 127–29, 131–34, 144, 156–59

control orders, 157

control principle, 138, 142, 153–54, 159

disclosure of documents, 135–43, 146, 154

extraordinary rendition, 135, 138, 148–49, 158

human rights violations, 152

intelligence gathering, 124

intelligence sharing, 124, 138

judicial determination of claims, 153

Justice and Security Act (2013) (UK), 135, 157, 159

*Norwich Pharmacal* jurisdiction

*see Norwich Pharmacal* jurisdiction

open justice

*see* **Open justice**

public interest immunity, 138, 140, 146, 152

rule of law, 159

secret evidence

*see* **Secret evidence**

security detentions, 181

*see also* **Security detentions**

September 11 attacks, 159

special advocates, 118–19, 128–30, 135, 157

terrorist activity, 122–23

transparency, 159

United Kingdom, 135, 146, 157, 159

United States of America, 146–51

**Necessity**

necessity and balancing

alternative measures, 58, 60–61

arbitrary results, 58

feasible alternatives, 60, 93–94

lessening of protection, 59

normative evaluation, 60

proportionality analysis, 57–58

reduced effectiveness, 60

restricting deadly force, 75–77, 94

separation of powers, 59

value judgments, 58, 60

necessity inquiry

balancing, 42, 47

comparativity, 42, 51, 56–57

diligence requirement, 62

evidentiary issues, 47, 62

feasible alternatives, 52–53, 60

fundamental rights protection, 62

good judgment, 62

impact, 42, 51, 55–56

importance, 42

instrumentality, 42, 51, 53–55

judicial deference, 62

legislative discretion, 47–48

means, objectives and rights, 62

moderate necessity, 42, 61–62

- normative and qualitative process, 62
- optimisation, 42, 44, 51, 53–54
- possibility, 42, 51–53
- presumption in favour, 46–47
- qualitative dimensions, 42
- restricting fundamental rights, 61–62
- strengths and weaknesses, 42
- strict interpretation, 42
- substantive and normative reasoning, 83
- strict necessity
  - alternative measures, 45–46, 49, 51, 61
  - defeating legislative measures, 44–45
  - equal effectiveness, 49–50, 53–54, 58
  - interpretation, 42
  - judicial deference, 47–49
  - judicial expediency, 50–51
  - justification burden, 44, 46
  - least-intensive measures, 45–46, 49
  - normatively justified measures, 44–45
  - optimisation requirements, 42–44
  - overly-strong, 44–49, 61
  - separation of powers, 45, 59
  - strict interpretation of necessity, 43–44, 51
  - strong interpretation, 43
  - unreasonable outcomes, 48
  - weakness, 49–51, 61
- New Zealand**
  - human rights enforcement, 18
- Norwich Pharmacal** jurisdiction
  - disclosure of documents, 135–38, 154–56
  - existence of wrongdoing, 137–38
  - foreign proceedings, 156
  - information necessary for claimant redress, 137–38
  - information within scope of available relief, 137–38
  - involvement in wrongdoing, 137–38
  - judicial discretion, 138
  - lack of jurisdiction, 156
  - legislative curtailment, 135–36, 144–45, 158
  - sensitive information, 136
  - third party wrongdoing, 136
- Open justice**
  - accountability, 121–22
  - Canadian Charter of Rights and Freedoms, 124
  - Canadian Supreme Court, 119, 121–22, 124–25, 129–30
  - closed material procedure, 127–29, 131–34, 144, 156–59
  - counter-balancing measures, 124–26
  - democratic concerns, 122
  - discontinuing proceedings, 126–27
  - European Court of Human Rights (ECtHR), 122–25, 127, 130
  - European Court of Justice, 123
  - fair judicial process, 119, 132
  - fair trial, 120, 122, 131
  - freedom of expression, 121
  - gisting of evidence, 129–31
  - importance, 119–21
  - information about the case, 125
  - intelligence gathering, 124
  - intelligence sharing, 124
  - judicial balancing, 125–27
  - judicial independence and impartiality, 121
  - multi-faceted principle, 122
  - national security threats, 122–25, 127, 129, 133–34
  - natural justice, 120
  - negative consequences, 121
  - opposing interests, 122
  - personal liberty, 124
  - police investigations, 124
  - procedural justice, 124
  - procedural protection, 125
  - process rights, 119
  - provision of necessary information, 125
  - public hearing, 119
  - public interests, 122–27
  - safeguards, 127–28
  - security detentions, 198, 201
  - terrorist activity, 122–23
  - transparency, 121
  - US Court of Appeals, 119, 124, 130
- Originalism**
  - human rights adjudication, 84
- Pluralism**
  - adjudicating pluralism
    - see **Adjudicating pluralism**
  - competing values, 27
  - contradictory interpretations, 27
  - human rights law, 27
- Precedent**
  - judicial reliance, 23
- Proportionality**
  - abandonment, 32–33
  - academic scholarship, 31–32, 40
  - bright-line rules, 67
  - categorical reasoning, 59, 74
  - constitutionally protected interests, 72, 88–90, 100
  - differing conceptions, 22
  - dual role, 21
  - freedom of religion, 22
  - freedom of speech, 77
  - human rights provisions
    - individual autonomy, 72
    - judicial application, 72
    - state interference, 72
  - importance, 31
  - judicial deference, 22–23
  - measures restricting rights
    - balancing stage, 33–35, 50, 88, 90–91, 93
    - burden on individual interests, 88
    - Canada, 41
    - convergence, 41
    - differing justifications, 41
    - fundamental rights, 61
    - Germany, 41
    - government measures, 87–89, 91
    - interference with rights, 31, 33
    - legitimate goal stage, 33, 39
    - necessity stage, 33–37, 42
    - object and means, 41

**Proportionality (cont):**

- measures restricting rights (*cont*):
  - rational connection stage, 33, 39, 41, 88, 90–91
  - rights adjudication, 31, 41
  - suitability requirement, 33, 39, 41–42, 76, 79, 88, 90–91
- necessity, 33–37, 42, 88, 90–94
  - see also* **Necessity**
- perceived weaknesses, 32
- practical reasoning, 68
- prevalence in practice, 22
- proportionality analysis, 20–22, 57–58, 63, 72, 79, 83, 87–88
- proportionality tests
  - see* **Proportionality tests**
- theoretical framework, 31–33

**Proportionality tests**

- ad hoc balancing, 37–38, 59, 63, 72–73, 81, 83
- alternative means, 92
- bright-line rules, 37–38, 59, 75, 79–80, 83, 85
- Canada, 34–35, 38, 74, 81, 88, 93
- consumer protection, 92–93
- detailed analysis, 42
- empirical uncertainty, 33
- European Court of Human Rights (ECtHR), 73, 88, 91
- European experience, 87–88, 90–91, 101
- Germany, 33–37, 72–73, 75, 77, 88, 102–4, 111, 113–14
- human rights adjudication, 71–72
- individual liberties, 83
- Israel, 91–92
- judicial diversity, 33
- justification for state action, 87–89
- legitimate aim, 38, 40, 72
- less restrictive measures, 92, 94, 114
- limitation clauses, 88, 101–2
- means-end proportionality, 72, 88, 91, 103, 114
- minimal impairment, 72, 88, 93
- multi-step procedure, 90–91, 114
- necessary restriction, 72–73, 76, 79
- necessity stage, 36–37, 42
- normative commitments, 33
- proportionality *stricto sensu*, 42, 58, 63
- rational connection stage, 33, 39, 41
- restricting government's aim, 92–93
- self-determination, 83–84
- South Africa, 79–80
- substantial of pressing concern, 73
- suitability requirement, 33, 39, 41–42, 76, 79, 88, 90–91
- technical approach, 91–92
- two-stage process, 88–90, 100
- UN Human Rights Committee, 74
- US Supreme Court, 37, 39–40, 73, 75, 77, 87, 90, 102, 104–13
- use of force, 36–37

**Public interest immunity**

- Binyam Mohamed* case, 138, 140, 146, 152
  - see also* *Binyam Mohamed* case
- disclosure of documents, 138, 140, 146, 152–53
- judicial review, 152

- national security, 152
- Wiley balance, 152

**Religion and the state**

- see also* **Church autonomy**; **Religious institutions**;
- Religious symbols**

- ECHR protection, 216, 218
- ECtHR decisions, 210–12, 216–18
- freedom of religion, 210, 216–17, 219
- Islamic dress, 212, 219, 224, 236
- neutrality
  - aligned with separation, 218
  - freedom of religion, 216
  - state's position, 215–16
  - tolerance, 216
- pluralism
  - aligned with accommodation, 218
  - freedom of religion, 216
  - intolerant beliefs, 215–16
  - negotiation between different interests, 216
  - state's position, 215–16
  - tolerance, 215
- secularism, 217–18
- secularity, 218
- separation and accommodation
  - accommodationist approach, 213
  - church autonomy, 214
  - co-existence, 213
  - co-influence, 213
  - co-maintenance, 213
  - inter-independence, 214–15
  - religious symbols, 214
  - state autonomy, 214
  - US position, 213
- sovereign spheres, 216–17
- US Constitution, 216, 218
- US Supreme Court, 212–13, 216–17
- zones of competence, 217

**Religious autonomy**

- see* **Church autonomy**

**Religious discrimination**

- employment practice, 210–11, 219, 225
- immunity approach, 219–20, 225, 229–32
- incentives, 220
- liberal legal systems, 225
- non-discrimination, 210–11, 219–20, 225
- ordinary law approach, 219–20, 225–29
- portfolio approach, 219–20, 237
- procedural fairness, 219, 225, 232–34
- religious autonomy, 219
- religious practice, 224, 236–37
- religious symbols, 212
- religiously-affiliated employers, 210–11, 220
- rights-balancing approach, 219–20, 225, 234–36

**Religious employers**

- case law, 210–11
- church autonomy, 209–11, 219
- comparativism, 238–39
- constitutional provisions, 238
- decline in belief, 219
- employment practice, 210–11, 219, 225
- freedom from the state, 209

immunity approach (discrimination)  
 employee's rights and interests, 231–32, 269  
 ministerial exception rule, 229, 231  
 religious autonomy, 229  
 religious freedom, 232  
 secular interference, 229–31  
 termination of employment, 230–32  
 US Supreme Court, 230

incentives, 220

labour law standards, 219

legal uncertainty, 235, 238

nature of the institution, 210

nature of the job, 209–10

non-discrimination, 210–11, 219–20, 225

ordinary law approach (discrimination)  
 Australia, 228  
 employment environment, 229  
 equality, 227  
 genuine occupational requirement, 226–29  
 improper religious influence, 226  
 religious autonomy, 226, 228  
 religious commitment, 228

portfolio approach, 219–20, 237

procedural fairness (discrimination)  
 ECHR protection, 233  
 ECtHR decisions, 232–33  
 immunity from scrutiny, 234  
 judicial oversight, 232  
 jurisdictional differences, 232  
 minimal requirements, 232–33  
 religious autonomy, 233–34  
 response to allegations, 232–33  
 termination of employment, 233–34

protection of interests, 210

rights balancing approach (discrimination)  
 benefits, 234  
 competing rights, 234, 269–70  
 ECtHR decisions, 234–36, 270  
 Germany, 235–36  
 human rights-based approach, 235  
 legal uncertainty, 235  
 relevant rights and interests, 236  
 religious autonomy, 234  
 value judgments, 235

secular employment laws, 225

uniform workplace protections, 237

### Religious freedom

*see* Freedom of religion

### Religious institutions

autonomy, 220, 241–42

competence  
 admissions and employment, 241, 248  
 freedom of religion distinguished, 241

delegated powers, 241–42

domestic authority, 242

ECtHR decisions, 220

employment policies, 220

freedom of religion, 220

Germany, 220, 247–52, 258

internal affairs, 220, 241

internal power, 242–257

religious schools, 220–21

respect for private and family life, 220

self-determination, 241–42

South Africa, 220, 224, 252–58, 275

sovereign powers, 242

sphere sovereignty, 220, 241–42, 245–46

USA, 220, 243–46, 257–58

### Religious practice

comparativism, 223

inclusion, 224

non-discrimination, 224, 236–37

period of transition, 223, 236

rejection, 223, 236

religious disputes, 223

religious diversity, 223–24, 234, 236

### Religious symbols

Australia, 220–21, 225

discrimination, 212, 214

ECHR protection, 211–12

ECtHR decisions, 211–12, 217–18, 224

public sphere, 209

restriction, 216–17, 219, 224, 237

South African cases, 211–12

state freedom from religion, 209, 214

state schools, 209

UK cases, 211–12, 224–25

US cases, 211–13

### Rights interpretation

alternative approaches, 20

balancing of rights, 18–19, 21–22

categorical approaches, 20–22

descriptive approach, 18–20

doctrinal method, 20

functional method, 20

historical method, 17–19

normative reasoning, 19–20

proportionality, 20–21  
*see also* Proportionality

prudential method, 20

structural method, 20

teleological method, 20

textual interpretations 17–19

### Secret evidence

case law, 118–19, 134

cleared counsel, 118  
*see also* Cleared counsel

competing public interests, 118, 126

deference, 118

deprivation of liberty, 161–64, 168  
*see also* Deprivation of liberty

disclosure of confidential matters, 117, 127,  
 131–32, 162

equality before the law, 152

immunity of state officials, 152

Israel, 119, 186, 195–96, 198–99, 202, 204,  
 206

judicial scrutiny, 152

open justice, 118–27  
*see also* Open justice

public detriment, 118

safeguards, 118, 127–28

scrutiny of proceedings, 133–34

**Secret evidence (cont):**

- security detentions, 183, 186, 191–93, 195–96, 198–99, 202, 204, 206
- separation of powers, 118, 133–34
- special advocates, 118–19, 128–30, 135, 157
- Special Immigration Appeals Commission, 156
- transparency, 118
- UK position, 163–64, 168
- US position, 162–63, 170

**Security detentions**

- Guantánamo Bay detainees, 182
- intelligence information, 181
- Israel, 180–84, 186, 188–89, 191–206
- judicial review, 180–83
- national security concerns, 181
- realisation of rights, 181
- reasoning of rights, 181
- rule of law, 180
- secret evidence, 183, 186, 191–93, 204
- special advocates, 181, 183, 204–5
- transnational terrorism, 182

**Separation of powers**

- ad hoc balancing, 71
- necessity and balancing, 59
- secret evidence, 118, 133–34
- socio-economic rights, 321, 330
- strict necessity, 45, 59

**Social rights**

*see also* **Social rights problematic; Social rights**

- review
- autonomy, 302
- demarcation lines, 302
- dignity, 302
- equality of status, 302
- EU Charter of Fundamental Rights, 360
- German Constitutional Courts, 360
- international human rights law, 7
- normative obligations, 302
- progressive realisation, 289, 312, 316–17, 323, 326–27, 337
- protection, 307–308
- resource allocation, 303
- strong remedies, 358, 374
- strong rights, 374

**Social rights problematic**

- academic interest, 308–9
- CJEU jurisprudence, 309
- differing national responses, 309–10
- ECtHR decisions, 309–10
- EU Charter of Fundamental Rights, 309, 311
- Global South, 308, 310–11
- Inter-American Court of Human Rights, 310
- legally enforceable rights, 308
- nature, 285
- orthodox constitutional theory, 307–9, 311, 314
- pressure on legal systems, 312, 315
- protection of social rights, 307–8
- transformative constitutionalism, 310, 313
- UK position, 308–9

**Social rights review**

- administrative law controls, 303–4, 314

African Commission on Human and People's Rights, 306

boundary conditions, 312, 314

civil and political rights distinction, 300–4, 306, 308, 317

Committee on Economic, Social and Cultural Rights, 306, 315

comparative approach, 300

constitutional culture, 313, 316–17

constitutional protection, 301, 307

different models, 315–17

differing legal systems, 312, 314–15, 317

distribution of resources, 314

diversity, 299–300

ECtHR decisions, 306

enforcement of social rights, 299, 305

European Committee on Social Rights, 306

European Social Charter, 300, 302, 306

general model, 312, 315

generic model, 317

German Constitutional Court, 312, 316

German constitutional order, 301

global competitive pressures, 307

Greek Constitution, 301

global debate, 299

human rights protection, 305–6

impermissible review, 301, 317

incremental approach, 316

Indian Constitution, 301

Inter-American Convention on Human Rights, 300

Inter-American Court on Human Rights, 306

International Covenant on Economic, Social and Cultural Rights, 300, 302, 306

legal protection, 300, 305–8, 311–12, 315

limits on power, 313

merits, 311

national socio-economic structure, 313

nature of social claims, 313–14

neo-liberal ideologies, 307

orthodox constitutional theory, 300–1, 303–8, 312, 317

progressive realisation of rights, 289, 312, 316–17, 323, 326–27, 337

public authority compliance, 303

reasonableness review, 312, 315–16

resource allocation, 300, 303, 307, 315–17

rule of law, 303

social and political legitimacy, 313

social rights problematic, 285, 299, 307–13

*see also* **Social rights problematic**

social state principle, 301

socio-economic well-being, 301

source of judicial authority, 313

South African Constitutional Court, 312

technology of review, 307

transformative constitutionalism, 310, 313, 316

UK position, 315–16

US State Constitutions, 301

**Socio-economic rights**

*see also* **Social rights; Social rights review**

case law, 281–83



- comparative lessons, 282
  - constitutional justice, 285
  - distributive justice, 13, 285
  - emergence of rights
    - asylum-seekers rights, 283
    - autonomy, 284–85, 305
    - Canadian Supreme Court, 283
    - civil and political rights framework, 283
    - constitutionalism, 284–85
    - discriminatory action, 283
    - ECHR protection, 283
    - ECtHR decisions, 284
    - German Constitutional Court, 284, 296–97
    - Global South, 285
    - House of Lords decision, 283–84
    - human rights protection, 305–6
    - increasing prominence, 281–82
    - inter-institutional dialogue, 290
    - International Covenant on Economic, Social and Cultural Rights, 284
    - positive freedom, 284
    - rapid emergence, 283–84
    - South African Constitution, 284
    - Universal Declaration on Human Rights, 284
  - enforcement
    - future developments, 281–82
    - judicial activism, 290–95
    - judicial deference, 282
    - judicial enforcement, 281–82, 286–87
    - judicial review, 299–300
    - positive dimensions, 290
    - prescriptive approach, 282, 288
    - standard of review, 296–97
  - India
    - see* India
  - justiciability, 281
  - justification for measures, 282
  - Latin American jurisdictions, 297
  - meta-principles, 24
  - negative duties and obligations, 282, 290–91
  - positive rights and obligations, 13, 282, 286–87, 290
  - protection 11, 25, 305–7, 311
  - remedies
    - coercive forms, 282, 291
    - declaratory forms, 282, 288, 291
    - stronger remedies, 282, 290–91, 294–95, 317
    - weaker remedies, 282, 288, 295, 317
  - social justice, 285, 289
  - social rights problematic, 285, 299, 307–11
    - see also* Social rights problematic
  - South Africa
    - see* South Africa
  - strong rights, 282–83, 290–91, 293–95, 317
  - United States of America
    - see* United States of America
  - universal approach, 296
  - weak rights, 282–83, 288, 295, 317
- South Africa**
- ad hoc balancing, 64
  - constitutional rights, 53
  - freedom from discrimination, 13
  - judicial selection, 355
  - religion and the state
    - equality law, 224
    - religious symbols, 211–12, 256–57, 275
    - religiously-affiliated employers, 210–11
  - religious institutions
    - audi alteram partem*, 255
    - constitutional rights, 255–56
    - disciplinary powers, 255
    - discrimination, 252–54, 256, 275
    - dismissal of employee, 252
    - ecclesiastical tribunals, 255–58
    - equality concerns, 224, 253–54
    - freedom of religion, 255–57
    - internal affairs, 220
    - self-determination, 255, 257
    - sphere sovereignty, 220, 254–58
    - state interference, 253–54, 257
  - sexual orientation, 252–54
  - social rights, 312
  - socio-economic rights
    - access to health care, 287–88, 322
    - access to housing, 287–88, 322, 327–31, 334–36, 345
    - accountability, 286–87, 289
    - Bill of Rights, 319
    - comparative perspective, 332–33
    - constitutionalisation, 319–20, 335
    - continual review, 330
    - criticisms, 328–30
    - culture of justification, 286–87
    - declaratory remedy, 288, 291
    - deliberative remedies, 331–32
    - dignity and equality, 325
    - HIV/AIDS treatment, 324, 336, 338, 351
    - inter-institutional relationships, 337
    - judicial capacity, 286, 289, 320–21, 334
    - judicial deference, 329–30, 333
    - judicial enforcement, 286–87, 289–90
    - judicial legitimacy, 286, 289, 321–23
    - judicial restraint, 287
    - judicial scrutiny, 322
    - justiciable rights, 319–21
    - legitimacy of rights, 336
    - minimum core approach, 288, 296, 312, 324, 334–35, 337, 346
    - negative obligations, 290, 321–22
    - negative remedies, 330–31
    - policy-making process, 326–27, 334
    - political context, 333
    - political engagement, 337
    - positive obligations, 286–87, 321–22, 326–27
    - positive remedies, 330
    - progressive realisation, 323, 327, 337
    - protection, 11
    - public policy, 325
    - reasonable legislative measures, 322–23
    - reasonableness standard, 289, 295–97, 312, 315–16, 323–24, 327–29, 333–35, 337
    - resource allocation, 321
    - right to basic education, 323
    - right to water, 288–89, 325–27

**South Africa (cont):**

- socio-economic rights (*cont*):
  - rights of access, 322–23
  - role and purpose of rights, 326
  - separation of powers, 321, 330
  - social change, 295–96
  - social justice, 289, 335, 338
  - social mobilisation, 337
  - social security, 322
- South African Constitution, 340–41
- South African Constitutional Court, 282–83, 287–90, 292, 295–97, 323–37
- standard of review, 323–25
- strong remedies, 325
- theory of deference, 286–87, 295
- weak remedies, 325
- South African Constitutional Court
  - citizen's rights, 18
  - gay rights, 17
  - human dignity, 79–80
  - necessity inquiry, 54
  - proportionality 79–80
  - social rights, 312
  - socio-economic rights, 282–83, 287–90, 292, 295–97, 323–37

**Special advocates**

*see also* Cleared counsel

- Canada, 161–62, 164, 167–68, 171, 174, 181, 183, 204
- national security, 118–19, 128–30, 135, 157
- security detentions, 181, 183, 204–5
- UK position, 168–170, 181, 183, 197, 204–5
- US position, 183, 204

**United Kingdom**

*Binyam Mohamed* case

*see Binyam Mohamed* case

- child protection, 360
- deprivation of liberty
  - classification decisions, 173, 175
  - cleared counsel, 161–63, 168–71, 173, 176–77
  - common law, 170
  - control orders, 164, 168
  - detention, 164, 168
  - disclosure of evidence, 168–69
  - freezing of assets, 168
  - gist of evidence, 168–69, 173, 175
  - Internet searches 170
  - natural justice, 170
  - secret evidence, 163–64, 168
  - security detentions, 181, 183
  - special advocates, 168–70, 181, 183, 197, 204–5
  - terrorist suspects, 164
- Human Rights Act (1998)
  - compatible measures, 18
- Justice and Security Act (2013)
  - closed material procedure, 157, 159
  - controversial measure, 135
  - disclosure of documents, 135
  - safeguards, 157
  - security interests, 157
- national security

- control orders, 164
- law reform, 146
- legal culture, 152–54
- religion and the state
  - religious symbols, 211–12, 224–25
  - religiously-affiliated employers, 210–11
- social rights, 308–9, 315–16, 360
- socio-economic rights, 283–84
- welfare benefits, 361

**United State of America**

*see also* US Supreme Court

- Bill of Rights 10, 13
- constitutional law, 39
- constitutional litigation, 10
- constitutional rights adjudication
  - balancing tests, 90
  - burden on right-protected interests, 94
  - definitional approach, 90, 100
  - empirical evidence, 110–11, 113–14
  - formalistic decision-making, 109–10, 112–13
  - government measures, 94
  - limitation of rights, 90, 100
  - precedent, 100–1
  - proportionality-based review 38–39, 106, 108, 110, 113
  - protected rights, 90
  - standards of review, 110–11
  - tiered scrutiny, 38–39, 94–100, 111, 113
  - value of aim, 94
- deprivation of liberty
  - classification decisions, 174–75
  - cleared counsel, 162–63, 165, 171–73, 177
  - detention, 163
  - due process rights, 170–71, 174
  - fair hearing, 162, 170–71
  - habeas corpus, 152, 163, 170
  - Guantánamo Bay, 163–66, 171
  - redacted information, 174–75
  - secret evidence, 162–63, 170
  - security detentions, 183
  - special advocates, 183
- judicial borrowing, 24
- national security
  - cleared counsel, 152
  - extraordinary rendition, 148
  - Guantánamo Bay, 163
  - habeas corpus, 152, 163
  - law of standing, 146
  - legal culture, 153–55
  - political question doctrine, 146
  - right to due process, 148, 151
  - sovereign immunity, 146
  - state secrets doctrine, 146–51
- open justice, 119, 124, 130
- religion and the state
  - doctrinal entanglement, 257–58
  - ministerial exception, 243–45
  - religious institutions, 220, 243–46, 257–58
  - religious symbols, 211–13
  - religiously-affiliated employers, 210–11
  - separation and accommodation, 213
  - sphere sovereignty, 245–46, 258

- state intervention, 243, 257–58
- US Constitution, 216, 218
- religious schools
  - discrimination, 268–69
  - dismissal of employee, 268–69
  - ministerial exception, 268–69
- social rights
  - administrative collaboration, 369
  - adversarial legalism, 371, 376
  - balancing constitutional rights, 374
  - cooperative assessment, 376
  - defensive judicial behaviour, 371, 376
  - domination of bureaucracies, 376
  - due process, 359, 361–62
  - educational rights, 360–61, 365–67, 374
  - equal protection clause, 359
  - equality in education, 360–61, 369, 374
  - exceptionalism, 358–59, 375–76
  - fragmentation of policy efforts, 373
  - housing rights, 363–65
  - human rights obligation, 359
  - impact on bureaucracies, 358
  - inter-institutional collaboration, 374–75
  - judicial activism, 374
  - judicial borrowing, 377
  - judicial competence, 363
  - judicial intervention, 358, 368–74, 376
  - justiciability, 359
  - legislative reforms, 373
  - litigation complexity, 376
  - litigation costs, 371
  - litigation culture, 374
  - litigation periods, 371–72
  - low public commitment, 374
  - marginalised groups, 358
  - medical assistance for prisoners, 362
  - poverty law, 358
  - scarcity and polycentricity, 371
  - social rights review, 301
  - State Constitutions, 363–67
  - strong remedies, 358, 374
  - strong rights, 374
  - structural injunction, 362–63
  - sweetheart litigation, 372
  - uncertainty and disruption, 373
  - unclear political accountability, 371–72
  - undue influence of attorneys, 372, 374
  - US Constitution, 358–63
  - welfare rights, 358–61, 376
- socio-economic rights
  - case law, 282
  - constitutional rights, 292, 294
  - decreased social spending, 295
  - disability rights, 358
  - educational inequality, 293
  - enforcement of rights, 293–94
  - income equality, 357
  - international institutional collaboration, 294
  - judicial activism, 292–95, 333–34
  - low public commitment, 292, 294, 357, 374
  - political commitment, 332
  - protection, 11, 26
  - poverty, 357
  - social attitudes, 357–358
  - social welfare, 293–94, 332, 358–60, 376
  - strong remedies, 294
  - strong rights, 293–94
  - US Supreme Court, 292–93, 332
  - welfare recipients, 293
- state secrets doctrine
  - disclosure of evidence, 147, 149–51
  - extraordinary rendition, 148–49
  - government misbehaviour, 151
  - jurisdictional (Totten) bar, 146–48, 150–51
  - questions of exceptional importance, 150
  - right to due process, 148, 151
  - state secrets privilege, 146–48, 150–51
- statutory interpretation, 10, 13
- US Supreme Court**
  - ad hoc balancing, 73
  - common law court, 9–10
  - constitutional nature, 9
  - freedom of speech, 73
  - proportionality test
    - bright-line rules, 37
    - categorical reasoning, 39
    - constitutional rights, 87, 90
    - constraints on power, 102, 104–9, 113
    - economic liberties, 108, 113
    - Lochner* decision, 39–40, 104, 106–13
    - proportionality analysis, 106, 108, 110, 112
    - proportionality reasoning, 75, 77
    - right to liberty, 105, 108–10
    - substantive process, 105–6, 113
  - religion and the state, 212–13, 216–17, 230
  - rights interpretation, 20–21
  - socio-economic rights, 292–93, 332
  - tiered scrutiny
    - academic views, 98
    - adoption, 87, 90, 95
    - application, 97–98, 100
    - constitutional rights, 38–39, 94–100, 111, 113
    - degree of scrutiny, 95, 97–98, 113
    - government aim, 97
    - importance, 113
    - interest-balancing inquiry, 99–100
    - intermediate scrutiny, 95–97, 100, 111, 113
    - judicial disagreement, 98–99
    - limits, 100
    - minimal scrutiny, 95
    - rational basis review, 95, 98, 100
    - strict scrutiny, 95–100, 113

